88-897

Supreme Court, U.S.
FILED
NOV 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. ___

In The

Supreme Court of the United States

October Term, 1988

R.H. ASHENBAUGH, et al.,

Petitioners,

v.

CRUCIBLE INC 1975 SALARIED RETIREMENT PLAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JAMES J. AHEARN
Counsel of Record
138 West Main Street
Ligonier, Pennsylvania 15658
(412) 238-7771

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Is an unreduced Thirty Year Retirement benefit, available at the employees' election prior to attainment of age 65, a "retirement" rather than an "ancillary" benefit in nature, and therefore a benefit accrued within the meaning of Internal Revenue Code §411(d)(3), which is payable upon a partial termination to the extent then earned and to the extent the plan's funds permit?

II. Do benefit enhancement features of a plan, conditioned in part on the attainment of age, *i.e.*, a five percent increase of the basic pension amount effective no later than age 55, and a ceiling on pension amounts which is removed upon attainment of age 62, continue to be effective and to require the extension of such benefit enhancements upon the participants' attainment of such ages subsequent to the plan termination, to the extent that that plan's funds permit?

III. May a plan which provides that in the event of a partial plan termination "the assets of the trust under the plan shall be allocated in accordance with the priorities established in §4044 of ERISA . . . " be required, upon the occurrence of a partial plan termination, to so allocate the assets of the trust?

IV. Do ERISA §4044(d)(1)(A) and 26 C.F.R. §1.401-2 require a plan to satisfy the contingent, unreduced early retirement benefits of the participants before residual assets of that plan may be distributed to an employer?

LIST OF PARTIES

THIS IS A LIST OF THE 149 PETITIONERS.

R. H. ASHENBAUGH, R. B. ANDREWS, R. L. APPELDORN, A. L. AUSTIN, J. D. BALSER, A. BARRASSO, J. O. BAUER, H. W. BIGLEMAN, C. R. BLAZIER, J. P. BRESSANELLI, G. BROWN, E. BUCAN, J. M. BURKE, J. R. BUTCHKO, E. C. CALVIN, R. R. CAMPBELL, P. D. CASTELLANO, D. R. CAULEY, J. L. CERASI, E. CHAPMAN, S. CHRISTY, P. R. CIANCONE, T. M. COSTELLO, T. J. CURRY, G. DAUKA, A. J. DeCOSTA, A. P. Di MARZIO, O. E. EDWARDS, E. P. ERATH, E. P. FAHNERT, H. FARRINGTON, J. S. FERRENCE, R. D. FEYDO, E. R. FINGER, C. E. FIX, JR., W. FRANK, N. E. FREDERICK, J. P. FRENN, R. FRONKO, L. L. GIBBS, W. L. GLEASON, L. E. GORDON, J. E. GRIMM, P. E. GRUBBS, E. R. GUERRA, A. J. GULUTZ, J. T. HAAF, J. D. HAMACHER, JR., P. J. HANNON, R. M. HANSEN, M. I. HARPHAM, D. H. HELDMAN, G. W. HENGLEIN, J. K. HILE, R. T. HOPPER, H. M. HOWELL, J. B. ITZEL, JR., K. M. JANKE, C. L. JOBE, JR., K. H. JOHNS, R. O. JOHNSON, JR., L. M. JOHNSTON, E. T. JONES, R. KAO, D. P. KERR, JR., P. A. KEYS, R. W. KNALLEY, E. E. KNAPEK, W. J. KOFALT, S. W. KOHLER, T. KOMINITSKY, T. R. KRUPA, J. R. KUNDICK, W. LAKE, D. F. LANEVE, T. LEHMANN, R. H. LEWIS, R. A. LIPPERT, W. R. LIVINGSTON, A. J. LYNN, D. B. McCLAIN, J. L. McKAIN, E. L. MARSH, C. R. MARTSOLF, F. S. MATSUKAS, T. J. MAYTON, M. MITROVICH, M. A. MOLCHAN, A. N. MORRISON, H. MRAUNAC, M. R. MUCKIAN, C. W. MURRAY, III, C. J. MYERS, L. V. NAGLE, E. ORDICH, W. H. ORR, A. J. PASKO, JR., M. E. PELLEGRINO, G. C. PESCION, G. V. PETERSON, R. F. PISANO, W. J. POPP, G. P. PORTO, G. POSTICH, D. E. POWELL, R. W. PRENTICE, J. PRESUTTI, W. C. PRICE, L. E. RAYKOVICS, T. R. REED, J. W. REIDER, M. J. ROSE, R. H. RUTTER, K. E. SANDERS, M. A. SARVER, P. K. SCHAKE, J. W. SCHOLTZ, W. T. SCOTT, J. G. SEMAN, A. H. SHELINE, M. L. SHERRY, F. R. SHUSS, W. W. SIMPSON,

LIST OF PARTIES – Continued

A. E. SIX, J. E. SMITH, E. H. SPAZIANI, W. H. STEPHENS, C. D. STROSNIDER, J. F. SUFFOLETTA, J. SUSICH, H. TAYLOR, F. S. THORNBERRY, JR., J. R. TICE, D. A. TOWNLEY, R. TRBOVICH, R. T. TURNER, R. R. VLAH, D. W. WARE, G. T. WEEKLEY, E. M. WERRIES, JR., J. A. WHITEHEAD, T. WILLIAMS, JR., T. H. WILLS, D. P. WOOD, A. J. YANNI, L. H. YOUNG, JR., R. C. YOUNG, H. F. YUTE, AND W. I. ZAZWIRSKY.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

OPINION OF THE COURT BELOW 1

GROUNDS OF JURISDICTION 1

GOVERNING STATUTES AND REGULATIONS 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

SUMMARY OF ARGUMENT 5

I. THERE IS CONFUSION IN THE CIRCUITS CONCERNING THE CORRECT RELATIONSHIP BETWEEN THE DEFINITION OF "ACCRUED BENEFIT" APPEARING IN TITLE I, SECTION 323 OF ERISA, AND CODE SECTION 411(a)(7)(A), AND THE PROVISIONS OF CODE SECTIONS 411(d)(3) AND 411(d)(6) 9

A. The Language Of The Provisions In Question Suggests A Congressional Intent To Insulate Code Section 411(d) From The Definition Of The Term "Accrued Benefit." 10

B. The Objectives Underlying Code Section 411(a), (b) And (c) Differ From The Purpose Of The "SPECIAL RULES" Of Code Section 411(d) 12

C. Code Section 411(d)(3) Repeats The Language Of Code Section 401(a)(7) Of 1962 The Meaning Of Which It Continues 13

TABLE OF CONTENTS–Continued

Page

D. In Enacting ERISA And Recodifying Code Section 401(a)(7) As Section 411(d)(3), Congress Was Aware Of, And Again Adopted The Meaning Given To, The Language Of That Predecessor Code Section By The Internal Revenue Service 16

E. The Courts Have Moved Away From The Application Of The "Accrued Benefit" Definition To Code Section 411(d) Concerns, And Toward The Retirement Versus Ancillary Benefit Test Intended By Congress 19

II. THERE IS CONFUSION IN THE CIRCUITS CONCERNING THE INSIGHT PROVIDED BY THE LEGISLATIVE HISTORY OF ERISA WITH RESPECT TO CONGRESS' INTENT CONCERNING THE CLASSIFICATION OF AN UNREDUCED EARLY RETIREMENT 21

III. THERE IS CONFLICT AMONG THE CIRCUITS CONCERNING THE APPROPRIATE DEGREE OF WEIGHT TO BE ACCORDED THE VIEWS OF THE INTERNAL REVENUE SERVICE WITH RESPECT TO THE STATUS OF UNREDUCED EARLY RETIREMENT BENEFITS AS PROTECTED ACCRUED BENEFITS 24

IV. THERE IS CONFUSION AMONG THE CIRCUITS CONCERNING ERISA'S SECTION 4044 ALLOCATION OF ASSETS..... 26

V. THERE IS CONFUSION AMONG THE CIRCUITS CONCERNING THE QUESTION OF WHETHER ERISA SECTION 4044(d)(1)(A) AND TREASURY REGULATION SECTION 1.401-2 REQUIRE A PLAN TO SATISFY CONTINGENT, UNREDUCED EARLY RETIREMENT BENEFITS BEFORE RESIDUAL ASSETS OF THE PLAN MAY BE DISTRIBUTED TO THE EMPLOYER .. 27

TABLE OF CONTENTS–Continued

Page

CONCLUSION AND PRAYER FOR RELIEF 29

APPENDIX TO PETITION FOR WRIT OF CERTIORARI ..... A. 1

TABLE OF AUTHORITIES

Page

CASES

Alessi v. Raybestos-Manhatton Inc., 451 U.S. 504, 513, 101 S.Ct. 1985, 1901 13

Amato v. Western Union International, Inc., 773 F.2d 1402 (2d Cir. 1985), *cert. den.*, 106 S.Ct. 1167 (1986) 7, 8, 20, 21, 23, 26, 27

Babb v. Olney Paint Co., 764 F.2d 240 (4th Cir. 1985) 24

Bencivenga v. Western Pennsylvania Teamsters & Employers Pension Fund, 763 F.2d 574, 577 (3d Cir. 1985) 7, 18

Blessitt v. Retirement Plan for Employees of Dixie Engine Co., 848 F.2d 1165 (11th Cir. *en banc* 1988), vacating 817 F.2d 1528 (11th Cir. 1987) 7, 8, 25, 27, 28

Boruta v. Commissioner, T.C.Mem. 1988-172, 9 E.B.C. 2031 15

Chait v. Bernstein, 835 F.2d 1017 (3d Cir. 1987) 7, 21

Collins v. Seafarers Pension Trust, 641 F.Supp. 293 (D.Md. 1986) 20, 24

Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 227, 77 S.Ct. 787, 790 (1957) 17

Rettig v. P.B.G.C., 744 F.2d 133 (D.C. Cir. 1984) 18

Shaw v. International Ass'n of M and A W Pension Plan, 750 F.2d 1458 (9th Cir. 1985) 7, 20

Tilley v. Mead Corporation, 815 F.2d 989 (4th Cir. 1987), certiorari granted October 3, 1988 ..... 7, 8, 27

Tipton & Kalmbach Inc. v. Commissioner, 83 Tax Court 154 (1984) 15

TABLE OF AUTHORITIES–Continued

Page

STATUTES

ERISA

Title I §2(a) 12

Title I §2(c) 12

§203(d) 13

§502(e) 5

§1016(a)(2)(c) 6

§4044 ..... 2, 9, 25, 27

§4044(a)(6) 8, 26

26 U.S.C. §401(a)(7) ..... *passim*

26 U.S.C. §411(a)(7)(A) 1, 6, 9, 11, 19

26 U.S.C. §411(a)(8) 1

26 U.S.C. §411(a)(9) 1

26 U.S.C. §411(c)(3) 1

26 U.S.C. §411(d)(3) ..... *passim*

26 U.S.C. §411(d)(6) 2, 8, 9

28 U.S.C. §1254 1

28 U.S.C. §1331 5

29 U.S.C. §1132 5

REGULATIONS

26 C.F.R. §1.401-2 ..... 2, 5, 9, 26, 27, 28

26 C.F.R. §1.401-6 ..... 2, 5, 26

TABLE OF AUTHORITIES–Continued

Page

LEGISLATIVE HISTORY OF ERISA

2 ERISA Leg. Hist. Page 2653 16

3 ERISA Leg. Hist. Page 4544 16

1974 U.S. Code Cong. & Ad. News 4670-4726 12

1974 U.S. Code Cong. & Ad. News 4890-4931 13

1974 U.S. Code Cong. & Ad. News 5038, 5054 21

1974 U.S. Code Cong. & Ad. News 5177-5180 12

Report of the House Ways and Means Committee
2 ERISA Leg. Hist. 2653 16

House Report 378, 87th Congress, 1st Sess. 15

OTHER AUTHORITIES

82 C.J.S. §276 17

Pension Claims: Rights and Obligations, Stephen Bruce (B.N.A. 1988) 18, 28

Black's Law Dictionary, (4th ed.) 18, 19

Webster's Third New International Dictionary 11

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this matter on August 23, 1988.

THE OPINION OF THE COURT BELOW

The Opinion of the court below appears in official reports as 854 F.2d 1516. The Opinion is also reported in 9 E.B.C. 2560 and is set forth in the Appendix as is the unpublished Opinion and Orders of the District Court.

GROUNDS OF JURISDICTION

The Opinion of the court below was filed on August 23, 1988. (A. 1-51) An Order denying a request for rehearing was issued September 19, 1988. (A. 52) The jurisdiction of this Court has been invoked under 28 U.S.C. §1254.

THE GOVERNING STATUTES AND REGULATIONS

The Employee Retirement Income Security Act of 1974, hereinafter referred to as "ERISA," governs this case. Particularly pertinent are Internal Revenue Code, hereinafter referred to as "Code," §411(a)(7)(A) defining the term "accrued benefit," Code §411(a)(8) defining the term "Normal Retirement Age," Code §411(a)(9) defining the term "Normal Retirement Benefit," Code §411(c)(3) "Actuarial Adjustment," Code §411(d)(3) "Termination or Partial Termination . . . ," the statutory predecessor to Code §411(d)(3), Code §401(a)(7) added October 10, 1962,

Code §411(d)(6), and §4044 of ERISA. The regulations involved in this case are Treasury Regulations 26 C.F.R. §1.401-2 "Impossibility of diversion under the trust instrument," and 26 C.F.R. §1.401-6 "Termination of a qualified plan."

STATEMENT OF THE CASE

There is no dispute that a partial termination of the Crucible Inc., 1975 Salaried Retirement Plan, hereinafter referred to as the "Plan," occurred when the Crucible steel mill in Midland, Pennsylvania, at which the 149 Petitioners, hereinafter referred to as "Participants" or "Employees," were employed, was shut down by Colt Industries in 1982. Crucible had become a part of Colt Industries in 1968.

With respect to the occurrence of a partial termination event, Article 12.1 of the Plan provides in part as follows:

> (b) In the event of termination or partial termination of the Plan, the assets of the trust under the Plan shall be allocated in accordance with the priorities established in Section 4044 of ERISA (or any successor statutory provision).
>
> (c) In the event of "termination" or "partial termination" of the Plan (as those terms are used in Section 411(d)(3) of the Internal Revenue Code, or any successor statutory provision) the rights of the Participants, Beneficiaries and Contingent Annuitants to benefits accrued to the date of such termination or partial termination, to the extent funded as of such date, shall be non-forfeitable.

The actuarial report for the Plan year ending December 31, 1982, showed a net actuarial gain of $14,422,385.

The Plan provides for a Normal Retirement in §4.1, an unreduced Thirty Year Retirement in §4.3, and an actuarially reduced Early Retirement benefit in §4.4.

The most important benefit denied by the Plan is a Participant's right to the portion of the unreduced Thirty Year Retirement benefit he had earned as of the partial Plan termination and his premature, involuntary retirement. The Participants claim that, while an event other than a partial Plan termination which caused a termination of employment before thirty years of service had been completed would cause the forfeiture of such a benefit, the partial Plan termination caused previously unvested rights to the earned portion of such a benefit to become vested.

The value of the benefits in dispute can be suggested by a hypothetical participant who had 27 years of service when terminated in 1982, was then 55 years of age and had a 5-year income averaging $32,000. The Plan calculates the benefit payable at age 65 to such a participant by applying the standard formula of years of service x average earnings x 1.1% x 1.05 which yields $9,980. The Plan then, in accordance with §4.4, Early Retirement, reduces that sum by 60% to $3,992, if benefits are to commence at age 55. The Participants assert entitlement to an annual benefit of $9,980 to commence when 30 years of service would have been completed, without an actuarial reduction or, if benefits were to commence at an earlier age, with an actuarial reduction running from the time 30 years of service would have been completed.

The Plan also provided for a five percent increase in the basic pension benefit through §4.1(d). The benefits provided by §4.1 were to be granted to, among others, those Participants described in §5.2, *i.e.*, those who did

not qualify for one of the retirement benefits described in Plan §4. The Plan has withheld the five percent increase from Participants who in 1982 did not qualify for a basic retirement benefit and denied it again when such Participants attained age 55 and thus qualified for "Early Retirement" pursuant to §4.4. The affected Participants claim the five percent benefit increase both on the basis of the plain wording of the Plan's provisions and on the basis of the theory that the partial termination of the Plan caused that five percent increase to become payable no later than the time the Participants attained age 55.

The second benefit enhancement feature of the Plan is §4.3 which relieves Participants, with average earnings in excess of $42,000 of the cap or limit barring pension credits for such excess earnings, upon attainment of age 62. The claim for relief from that cap, asserted on behalf of Participants with average earnings in excess of $42,000, who were denied the opportunity to continue in employment until attaining age 62, is based primarily upon the theory that the occurrence of a partial Plan termination caused the cap to become inapplicable as the Participants attained age 62 since the Plan was funded in the expectation that Participants affected by the cap would continue in employment until attaining age 62.

The District Court granted the Plan's Motion for Summary Judgment as to all complaint counts in Orders dated September 25, 1987 and October 9, 1987 (A. 59-62) and in an Opinion (A. 53-58) which expressed the view that a prior ruling of the Third Circuit concerning accrued benefits was controlling, rather than a contrary ruling of the Second Circuit. A divided panel of the Third Circuit Court of Appeals affirmed the Orders of the District Court.

The District Court's subject matter jurisdiction was exercised pursuant to §502(e) of ERISA, 29 U.S.C. §1132, as well as 28 U.S.C. §1331.

REASONS FOR GRANTING THE WRIT

SUMMARY OF ARGUMENT

The divided three-judge panel of the Third Circuit below declined to characterize an unreduced Thirty Year Retirement benefit as a "benefit accrued" within the meaning of Code §411(d)(3) and thus ruled that such a benefit was not a protected retirement benefit at all but instead merely an "ancillary" benefit that, if not vested upon a partial plan termination, was to be totally wiped out. The tax free contributions used to fund such benefits presumably are to revert to the employer as "excess assets." The protections accorded unvested benefits over the preceding decades were thus drastically reduced, at least so far as the Third Circuit is concerned.

Such unvested benefits were to become "nonforfeitable," *i.e.*, were to vest, to the extent a plan's funds permitted, upon a plan termination (as of 1963, a partial as well as a complete termination) and were to be protected from decrease through retroactive amendments by 26 C.F.R. §1.401-2 (A. 65, 66) prohibiting the reversion of tax exempt contributions to qualified plans except when contingent (unvested) as well as fixed (vested) liabilities had been satisfied, and a plan's excess funds were found to be solely the result of actuarial error.

Congress adopted, on October 10, 1962, through new Code §401(a)(7) (A. 65), the language of the then effective C.F.R. §1.401-6 (A. 68, 69), which required that upon a plan termination event "the rights" of employees to

"benefits accrued to the date of such termination . . . to the extent funded . . . [become] nonforfeitable." Code §401(a)(7) was amended by ERISA subsection (a)(2)(c) of §1016 "Conforming and Clerical Amendments." Its substantive provisions were recodified as Code §411(d)(3). Such a recodification continues the meaning of the original statute, the broad application of which was not hampered by the definition of "accrued benefit" prior to the 1974 enactment of ERISA, and which therefore may not be limited by the application of that definition subsequent to 1974.

The "accrued" benefits which were protected upon a termination event, and protected from decrease through a plan amendment, were the benefits which had been earned and funded but had not yet vested through the satisfaction of plan age and service conditions. Such benefits included unreduced pensions payable at the participant's option prior to age 65. (*See*, I C *infra*).

The legislative history of Code §401(a)(7) in 1962 and of ERISA in 1974 demonstrates that Congress was fully aware of the meaning the term "benefits accrued" had acquired and intended §411(d)(3) of ERISA to continue that meaning.

The Third Circuit panel in *Ashenbaugh* chose to reduce the protections provided by Code §§411(d)(3) and (6) to protections solely of an interest in an age-65 pension on the part of Plan Participants with less than ten years of service by applying the definition of "accrued benefit" appearing in Code §411(a)(7)(A) – where it serves to assure the minimum vesting requirements of ERISA, a pension benefit commencing no later than age 65, are observed – to the Special Rules of Code §411(d). The conclusion that Congress, in enacting ERISA,

intended such a drastic impairment of previously effective protections of employee interests in pension plans required the assumption that terms such as "benefits accrued" had acquired no definable meaning before 1974; that Code §§411(d)(3) and (6) should be regarded as new statutory enactments independent of any such prior meaning; a misreading of ERISA's legislative history; and a disregard for the views of the Second Circuit in *Amato v. Western Union International, Inc.*, 773 F.2d 1402 (2d Cir. 1985), *cert. den.*, 106 S.Ct. 1167 (1986), and the views expressed by the Internal Revenue Service, hereinafter referred to as "I.R.S.," as an *amicus curiae* in that case, concerning the status of unreduced early retirement benefits as protected, accrued benefits.

The most clear-cut conflict now apparent is between the decision of the Second Circuit in *Amato, supra*, and the decision of the Third Circuit in *Ashenbaugh* which declared:

> *Bencivenga [Bencivenga v. Western Pennsylvania Teamsters & Employers Pension Fund*, 763 F.2d 574, 577 (3d Cir. 1985)] stands as precedent in this circuit, and we are not free to adopt plaintiffs' position that *Amato* rather than *Bencivenga* should be followed here. In any case, we think *Bencivenga* better law. (A. 22)

The *Ashenbaugh* decision also conflicts in varying degrees with decisions of the Fourth Circuit in *Tilley v. Mead Corporation*, 815 F.2d 989 (4th Cir. 1987), certiorari granted October 3, 1988; the Eleventh Circuit in *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1165 (11th Cir. *en banc* 1988) vacating 817 F.2d 1528 (11th Cir. 1987); the Ninth Circuit in *Shaw v. International Ass'n of M and A W Pension Plan*, 750 F.2d 1458 (9th Cir. 1985), and an earlier decision of the Third Circuit itself in *Chait v. Bernstein*, 835 F.2d 1017 (3d Cir. 1987).

The *Amato* court appeared to assume that the definition of "accrued benefit" was to be applied to Code §411(d)(3) – and by implication to Code §411(d)(6) – but chose to interpret a phrase appearing in that definition, "expressed in the form of," as embracing an unreduced pension available at an age earlier than 65 since such a benefit was "expressed in the form of" an age-65 pension. Perhaps because of a measure of doubt that such an interpretation would be regarded as fully persuasive, *Amato* adopted as well the alternative theory that rights to an unreduced early retirement benefit, even if regarded as unaccrued, were compensable through an ERISA §4044(a)(6) allocation of assests. (A significant difficulty to be found in *Amato*'s application of the "accrued benefit" definition to Code §411(d) is that it would limit the scope of benefits vesting upon a plan termination to benefits which were capable of being expressed in the form of an age-65 pension).

Both the Fourth Circuit in *Tilley* and the original panel decision of the Eleventh Circuit in *Blessitt* appear to have been uneasy with the manner in which *Amato* had forced an unreduced early retirement benefit into the language defining "accrued benefit" and chose to provide the employees relief through the ERISA §4044(a)(6) route.

Tilley, which the Supreme Court agreed to review on October 3, 1988, is similar in its facts to *Ashenbaugh* in that in each case the employees, who had not satisfied the plan requirements for an unreduced early retirement benefit at the time of the termination, seek an order requiring that they be granted pension benefits actuarially reduced from the date on which they would have satisfied such requirements, but for the termination, rather than from age 65. The cases differ in that in *Tilley* the employees

place major reliance upon an ERISA §4044 allocation of assets theory of recovery while the Employees in *Ashenbaugh* rely primarily upon Code §411(d)(3). The employees in both cases stress Treasury Regulation 26 C.F.R. §1.401-2 which requires that, in addition to fixed liabilities, contingent obligations, *i.e.*, benefit credits accrued but previously unvested at the time of termination, be satisfied before excess plan assets may revert to the employer. The extent to which the positions of the employees in the two cases diverge is traceable in large measure to the confusion that now exists concerning the extent to which relief can be granted to employees affected by a plan termination pursuant to Code §411(d)(3).

A grant of the Petition would do much to resolve the doubts and conflicts which now cloud the meaning of Code §411(d) and would provide plan participants and plan administrators with an urgently needed understanding of their rights and obligations in the event of either plan terminations or amendments.

I. THERE IS CONFUSION IN THE CIRCUITS CONCERNING THE CORRECT RELATIONSHIP BETWEEN THE DEFINITION OF "ACCRUED BENEFIT" APPEARING IN TITLE I, SECTION 323 OF ERISA, AND CODE SECTION 411(a)(7)(A), AND THE PROVISIONS OF CODE SECTIONS 411(d)(3) AND 411(d)(6).

All of the appellate court decisions commented upon in this petition have assumed, without expressly considering the matter, that the formal definition of the term "accrued benefit" was to be applied in one fashion or another to the provisions of Code §§411(d)(3) and (6).

There are several reasons for believing this assumption to have been erroneous.

Most likely such an uncritical assumption was prompted by the understandable failure of various counsel in earlier cases to detect the pre-ERISA history of Code §411(d)(3) and to bring that history to the courts' attention. ERISA, both in its enacted and codified forms, provides no surface indication that Code §411(d)(3) is a recodification of Code §401(a)(7) enacted in 1962 and thus a statute which had already acquired a distinctive meaning and scope.

Counsel for the Employees in this case did bring much of the history of Code §411(d)(3) to the attention of the courts below. That history, which demonstrates the inapplicability of the 1974 ERISA definition of "accrued benefit" to a statute first enacted in 1962, would have been further examined if the Plan had chosen to argue that the definition was so applicable. The Plan, however, made no such contention and its brief did not even quote the definition. The majority of the panel below nevertheless unquestioningly applied the definition with full force to Code §411(d)(3). The rejection of the Employees' claims necessarily followed.

A. The Language Of The Provisions In Question Suggests A Congressional Intent To Insulate Code Section 411(d) From The Definition Of The Term "Accrued Benefit."

Subsection (a) of Code §411 is entitled "GENERAL RULE." Similarly, sub subsection (7)(A), in which the definition of "accrued benefit" appears, is introduced by the words "IN GENERAL." In contrast, subsection (d) of Code §411 is headed by the words "SPECIAL RULES." A

"general" rule or definition would appear to be inapplicable to a statutory section designated as "special" rules. Code §411(a)(7)(A) prefaces the definition of "accrued benefit" with the words: "For the purposes of this section. . . ." The purpose of Code §411 is clear from its title, the determination of "Minimum Vesting Standards." If a plan, such as Crucible's, offers a vesting schedule superior to the minimum requirements of Code §411, no purpose is served by attempting to apply that definition to it.

Code §411(d)(3) "TERMINATION OR PARTIAL TERMINATION . . . " declares its independence of the definition of an "accrued benefit," which appears in subsection (a), through the introductory phrase: "Notwithstanding the provisions of subsection (a). . . ." It would thus seem clear that the draftsmen of ERISA had taken special pains to assure that the definition of "accrued benefit" in subsection (a) would not intrude upon the interpretation and application of subsection (d). The word "notwithstanding" is defined by *Webster's Third New International Dictionary* as meaning: "without prevention or obstruction from or by; in spite of. . . ."

The fact that the definition speaks in the singular, "the employee's accrued benefit," while the "benefits accrued" of Code §411(d)(3) speaks in the plural, is also significant. The "accrued benefit" defined in Code §411(a)(7)(A) concerns but a single benefit (the age-65 pension which is the minimum permitted by Code §411) while the "benefits" which have accrued and vest upon a termination, embrace a wide variety of plans in which employees progressively gain an interest through their continued service. It would be in accord with Congress' intent in extending tax exempt status to contributions to

employee benefit plans, to require that *all* benefits so funded vest upon a plan termination.

B. The Objectives Underlying Code Section 411(a), (b) And (c) Differ From The Purpose Of The "SPECIAL RULES" Of Code Section 411(d).

Code §§411(a), (b) and (c) were designed to assure that the minimum vesting requirements fixed by Congress were actually observed and not subverted by inconsistent accrual formulae set forth in future plans. In this connection, Senator Williams, Chairman of the Senate Committee on Labor and Public Welfare, stated:

> A basic concern was that a plan not be permitted to use an accrual formula . . . to subvert the statutory intent to provide meaningful vested rights. . . . 1974 U.S. Code Cong. & Ad. News 5177, 5180.

Other portions of ERISA's legislative history indicate that the purpose of defining the term "accrued benefit" was to provide additional assurance that the minimum vesting standards set forth in Code §411 would be observed. Thus, in House Report No. 93-807 (1974 U.S. Code Cong. & Ad. News, pp. 4670, 4726), it is stated:

> *Accrued Benefits.* – Under the Committee Bill, the vested employee is protected in his right to all, or a certain percentage, of his "accrued benefit." It is necessary to provide the statutory definition of an "accrued benefit" because, unless there is a defined amount, vesting of an "accrued benefit" in whatever form is specified by the plan has little, if any, meaning. . . .

The body of ERISA itself emphasizes that its primary concern is with *minimum standards*. Thus, both §§2(a) and (c) of Title I, "FINDINGS AND DECLARATION OF POLICY" refer to the importance of assuring that *minimum* standards be met.

Section 203(d) of ERISA expressly provides that: "A pension plan may allow for nonforfeitable benefits after a lesser period and in greater amounts than are required by this part." In this connection, Senate Report No. 93-383 (1974 U.S. Code Cong. & Ad. News, pp. 4890, 4931) notes:

> It should be made clear that the standards of vesting provided in the committee bill are only intended as minimum standards. The bill's provisions are not intended to prohibit plans with more rapid vesting than that required under the standards in the bill.

In a similar vein, in *Alessi v. Raybestos-Manhattan Inc.*, 451 U.S. 504, 513, 101 S.Ct. 1895, 1901, it was noted that:

> Other than these restrictions [minimum vesting requirements] ERISA permits the total benefit levels and formulas for determining their accrual before completion of 15 years of service to vary from plan to plan. *See*, 29 U.S.C. §§1002(22), (23) (benefits defined merely as those "under the plan").

C. Code Section 411(d)(3) Repeats The Language Of Code Section 401(a)(7) Of 1962 The Meaning Of Which It Continues.

In limiting Code §411(d)(3) to the protection of only an age-65 pension benefit through the process of applying the definition of "accrued benefit" to the "benefits accrued" of Code §411(d)(3) (A. 23) the lower court and some of the other circuits as well overlooked the rich and long history of the Revenue Rulings of the I.R.S., and of the statutory sections containing the phrase "benefits accrued."

Prior to the rulings of the courts below, there had been no authoritative suggestion that an unreduced retirement benefit available before age 65 was a benefit somehow ancillary in nature and, if then not fully vested, deserving of total nulllification upon a plan termination.

To the contrary. I.R.S. Revenue Rulings, extending back to at least 1957, consistently define "Normal Retirement Age" as embracing an unreduced retirement at an age earlier than 65. Revenue Rulings 57-163 Part 5(e); 61-157 Part 5(h); 65-178 Part 5(e); and 69-421 Part 5(e), all define "Normal Retirement Age" as follows:

> The normal retirement age in a pension or annuity plan is the lowest age specified in the plan at which the employee has the right to retire without the consent of the employer and receive retirement benefits based on service to date of retirement at the full rate set forth in the plan (*i.e.*, without actuarial or similar reduction because of retirement before some later special age). . . .

With respect to employee rights to benefits upon a termination event, the Revenue Rulings reflect a clear determination that *all* benefits under qualified plans – to which employer contributions were tax exempt – were to vest or become nonforfeitable upon a plan termination. Thus, Rev. Rul. 57-163 Part 5(b)(3) recites:

> Qualified plans are to provide for distribution of funds upon termination. At such time, the rights of all participants are to be fully vested. . . .

Rev. Rul. 61-157 Part 5(c)(2) declares that:

> Qualified plans are to provide for fully vested rights in all participants, and for distribution of the funds, upon the termination of the plan. . . .

The I.R.S. practice of requiring the vesting of benefits upon plan termination was codified by Congress on October 10, 1962, through the addition of subsection (a)(7) to I.R.C. §401. The new Code §401(a)(7) provided that a trust was not to be considered a qualified trust unless the plan provided that, upon its termination, "the rights of all employees to benefits accrued to the date of such termination . . . to the extent then funded, or the amounts

credited to the employees' accounts, are nonforfeitable. . . ."

The House Report concerning the subsection (a)(7) added to I.R.C. §401 stated that:

> This new provision [re non-forfeitability of contributions upon a plan termination] adds to the statute a requirement which has been in Treasury regulations for many years. Thus, while there is no requirement for immediate vesting, *the bill precludes the possibility that contributions for employees which have been deducted for income-tax purposes may revert back to the employer, or owner-employee.* . . .(emphasis added)
>
> The bill adds three new paragraphs to §401(a) of the code; these have had the effect of codifying certain regulations and administrative practices of the Internal Revenue Service. These three new paragraphs apply to all pension plans, not merely those which cover owner-employees.
>
> *Vesting on termination of plan.* – The first of these new paragraphs requires that, upon termination of the plan or complete discontinuance of contributions thereto, the rights of all employees then covered by the plan must be non-forfeitable. . . . H. Rept. 378, 87th Cong. 1st Sess. (1962), 1962-3 C.B. 261, 268-269, 275-276.

The Tax Court, in *Tipton & Kalmbach Inc. v. Commissioner*, 83 Tax Court 154 (1984) stated, at page 161:

> We think that Congress, in enacting §401(a)(7), sought to protect employees from forfeiting their retirement benefits upon termination of a plan . . . unless the discharge is treated as a partial termination, a significant percentage of plan participants are compelled to forfeit accrued but unvested retirement benefits.

Essentially the same view was expressed by the Tax Court in *Boruta v. Commissioner*, T.C.Mem. 1988-172, 9 E.B.C. 2013, which stated in note 8: " . . . we note that a windfall clearly is not a result Congress intended when it

enacted Section 411(d)(3) to protect employees in the event of termination or partial termination of qualified trusts . . . "

Another Revenue Ruling establishing the proposition that earned but previously unvested interests in qualified plans must be regarded as protected and accrued is Rev. Rul. 81-12, 1981 C.B. 112, which ruled that a change in an actuarial factor which reduces an early retirement benefit is impermissible if applied retroactively so as to diminish benefits accrued prior to the change.

D. In Enacting ERISA And Recodifying Code Section 401(a)(7) As Section 411(d)(3), Congress Was Aware Of, And Again Adopted The Meaning Given To, The Language Of That Predecessor Code Section By The Internal Revenue Service.

The Report of the House Ways and Means Committee, 2 ERISA Leg. Hist., page 2653, declared that the provisions of ERISA with respect to plan terminations were fully in accord with pre-existing law. The House Report thus stated as follows:

> *Plan termination* – Under present law, all accrued benefits in a qualified pension plan must become fully vested (to the extent then funded) in the event of a termination . . . the committee bill makes clear that this rule of full immediate vesting is still to apply in the case of a termination, or a partial termination . . . make-up amounts (if any) are to be taken into account in determining the *accrued liabilities* which may become *vested* upon termination. (emphasis added)

The Conference Report, at page 277, (3 ERISA Leg. Hist. p. 4544) similarly states that: " . . . as under present law, all accrued benefits . . . must become fully vested . . . " upon a plan termination.

The continuity betweeen the two Code sections is shown by the language of Code §411(d)(3) which repeats virtually verbatim the language of pre-existing Code §401(a)(7). The two sections referred to are set forth in full in the Appendix at pages 64, 65.

The applicable rules of statutory interpretation in such a context are set forth in 82 C.J.S. §276, *"Continuance Or Alteration Of Existing Law By Revision Or Codification,"* as follows:

> (a) *In General.* In general, revision or codification of statutes is intended and regarded as a continuation of the previous law, and not as an alteration thereof, unles the intent to change is clear . . . (At p. 462)
>
> (b) *Change In Phraseology Or Punctuation; Addition Or Omission Of Words.* In the revision or codification statutes, a mere change in phraseology or punctuation, or the addition or omission of words, is not regarded as changing the operation, effect, or meaning of the statutes unles the intent to change is clear and unmistakeable. . . .(At p. 464)
>
> (c) *Changes In Arrangement.* In codifying or revising statutes, a mere rearrangement of the statutes, or of the sections or parts thereof, does not change meaning, operation, or effect of the statutes, unless an intention to do so is clear . . . (At p. 467)

In *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 227, 77 S.Ct. 787, 790 (1957), the court applied the rules of statutory interpretation summarized above and stated:

> [3] Statements made by several of the persons having importantly to do with the 1948 revision are uniformly clear that no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed.
>
> [4, 5] "The change of arrangement, which placed portions of what was originally a single section in

> two separated sections cannot be regarded as altering the scope and purpose of the enactment. For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed. * * * (Five Supreme Court citations are omitted)"

As the Third Circuit stated in *Bencivenga v. Western Pennsylvania Teamsters & Employers Pension Fund*, 763 F.2d 574 (3d Cir. 1985): " . . . the court must reconcile, wherever possible, seemingly inconsistent statutes or regulations." 763 F.2d at 579. The statutory definition of "accrued benefit" can be fully reconciled with the far broader term "benefits accrued" of Code §411(d)(3) by applying the definition simply and solely to the task for which it was designed – the assurance that Minimum Vesting Standards were met.

The treatise "Pension Claims: Rights and Obligations," *S. Bruce* (B.N.A. 1988) at pages 7 and 8, states:

> In recognition of ERISA's remedial purposes, the courts have uniformly held that ERISA is to be liberally construed, with the guiding principles being the findings and policies in Section 2 of the Act.

In support of the above statement, the author cites nine decisions of the Second, Seventh, Ninth, Tenth and D.C. Circuits, one of which, *Rettig v. P.B.G.C.*, 744 F.2d 133 (D.C. Cir. 1984), at note 54 states:

> . . . the overwhelming evidence of the remedial purpose of ERISA must be given due weight in construing provisions whose language and specific legislative history are susceptible of varying interpretations.

The I.R.S. and the courts applied the term "benefits accrued," appearing in Code §401(a)(7) and in the I.R.S. Regulations it codified, consistently with the commonly accepted meaning of the term "accrue" as "to increase; augment; to come by way of increase; to be added as an increase, profit or damage . . . " *Black's Law Dictionary*

(4th ed.). In this sense of the term, the Employees' interests in a Thirty Year Retirement benefit grew or "accrued" as each year of service brought them closer to satisfying the requirements for such a benefit.

The limited meaning appearing in Code §411(a)(7)(A) defining the term "accrued benefit" was not a factor in determining the meaning and scope of the "benefits accrued" over the course of the many years preceding the enactment of ERISA. Since Code §411(d)(3) simply recodified Code §401(a)(7), the broad meaning which the term "benefits accrued," acquired prior to ERISA continued to be effective in 1982, free of the influence of the definition of "accrued benefit," when the Plan termination event in this case occurred.

E. The Courts Have Moved Away From The Application Of The "Accrued Benefit" Definition To Code Section 411(d) Concerns, And Toward The Retirement Versus Ancillary Benefit Test Intended By Congress.

The ruling of the court below conflicts not only with views of the Second Circuit and the I.R.S. concerning the protections to be accorded unreduced retirement benefits available before age 65, but also with the views of virtually every other court that have considered the extent to which benefits, essentially retirement in nature rather than ancillary, are protected. We would note at the outset that the Plan itself designates the unreduced pension available after 30 years of service in the heading it applies to Plan §4.3, *i.e.*, "Thirty Year *Retirement*." (emphasis added) The term "ancillary" is defined by *Black's Law Dictionary*, (4th ed.). as meaning: "aiding; attendant upon; . . . auxiliary or subordinate." There is

nothing in a Thirty Year Retirement which is in any way subordinate, inferior to, or ancillary to an age-65 pension.

In *Shaw, supra,* the court found that a "living pension" plan which tied a pension level to the current salary of the job from which the pensioner retired, was an accrued benefit and not an ancillary benefit. This conclusion was based upon the fact that:

> The living pension feature fits more easily within the enumeration of accrued benefits. The feature is a "pension or retirement benefit"; it primarily provides retirement income; and it is not generally transferable from one employer to another. The living pension feature does not fit within any of the enumerated categories of ancillary or nonaccrued benefits. Aside from these categories, "the accrued benefit is to be determined under the plan." (At pp. 1463, 1464.)

The "living pension" feature of the plan under review in *Shaw,* however, was *not* a benefit "commencing at" age 65; instead, it provided for adjustments in the pension amount which were to become effective thereafter as salaries of the position from which the retiree retired were increased.

In *Collins v. Seafarers Pension Trust,* 641 F.Supp. 293 (D.Md. 1986), the court reviewed a plan which permitted a participant who had accrued a certain "extra" amount of service to retire before normal retirement date on full pension and called this an "Early Normal Pension." In holding that this benefit was not merely ancillary but rather an alternative form of normal retirement benefit, and thus an accrued benefit which could not be reduced, the court expressly endorsed the *Amato* court's reading of ERISA's legislative history and stated:

> . . . a funded, noncontingent early retirement benefit more closely fits the category of pensions, it is

> not merely an ancillary benefit. Thus an early retirement pension benefit which is an integrated part of a retirement plan, would fall within the scope of accrued benefits. (At pp. 296, 297)

In *Chait v. Bernstein, supra,* a panel of the Third Circuit expressly considered the soundness of the Second Circuit's ruling in *Amato* with respect to the vesting of "certain early retirement benefits" upon a partial termination event and declared:

> We find no conflict with *Amato* because it used §411 precisely the way we read it – to protect the anticipated benefits eliminated by sudden changes in the plan. (At p. 1021)

II. THERE IS CONFUSION IN THE CIRCUITS CONCERNING THE INSIGHT PROVIDED BY THE LEGISLATIVE HISTORY OF ERISA WITH RESPECT TO CONGRESS' INTENT CONCERNING THE CLASSIFICATION OF AN UNREDUCED EARLY RETIREMENT.

The Third Circuit panel in *Ashenbaugh* was correct in asserting (A. 22, 23) that several courts have referred to an excerpt from the house Report on ERISA (*reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5054), as a basis for concluding that Congress did not intend to classify "early retirement benefits" generally as accrued benefits. None of such cases, however, involved the pension benefit at issue in *Ashenbaugh, i.e.,* an unreduced retirement benefit available at the employee's election following thirty years service and prior to age 65. The Crucible Plan itself distinguishes between "Early Retirement" in §4.4–which provides for an actuarial reduction of an age-65 pension for those who retire before that age with less than 30 years of service–and the "Thirty Year Retirement" which is the subject of Plan §4.3. No justification is apparent for a judicial characterization of a

Thirty Year Retirement as an "early retirement benefit" to be accorded the inferior status of an ancillary rather than a protected retirement benefit.

To determine whether the pertinent portion of the House Report in question actually supports the view that Congress intended to classify an unreduced early retirement benefit as simply an ancillary benefit, we shall review that portion of the Report sentence by sentence.

The Report:

> In the case of a defined benefit plan, the bill provides that the accrued benefit is to be determined under the plan, subject to certain requirements.

The Plan, in §4.3, provides for "Thirty Year Retirement." Elsewhere, at §4.4, the Plan provides for "Early Retirement."

The Report:

> The term "accrued benefit" refers to pension or retirement benefits and is not intended to apply to certain ancillary benefits, such as medical insurance or life insurance, which are sometimes provided for employees in conjunction with the pension plan, and are sometimes provided separately.

An unreduced Thirty Year Retirement certainly falls within the category of "pensions or retirement benefits" and not in the category of "certain ancillary benefits, such as medical insurance or life insurance. . . ."

The Report:

> To require the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income.

Classifying an unreduced Thirty Year Retirement benefit as accrued would in no way "increase the cost of plans whose primary function is to provide retirement."

The Report:

> Also, where the employee moves from one employer to another, the ancillary benefits (which are usually on a contingency basis) would often be provided by the new employer, whereas the new employer normally would not provide pension benefits based on service with the old employer.

Since a new employer certainly would not provide "pension benefits based on service with the old employer" pursuant to a Thirty Year Retirement, it is again clear that a Thirty Year Retirement benefit does not fall within the category of ancillary benefits.

The Report:

> Also, the accrued benefit to which the vesting rules apply is not to include such items as the value of the right to receive benefits commencing at an age before normal retirement age, or so-called social security supplements which are commonly paid in the case of early retirement but then cease when the retiree attains the age at which he becomes entitled to receive current social security benefits, or any value in a plan's joint and survivor annuity provisions to the extent that exceeds the value of what the participant would be entitled to receive under a single life annuity.

A reference to "the right to receive benefits commencing at an age before normal retirement age, or so-called social security supplements" was intended to mean simply the right to receive benefits commencing at an age before normal retirement age *such as* so-called social security supplements. An unreduced early retirement benefit is unaffected by social security eligibility.

The Second Circuit's view in *Amato*–that the language of the House Report quoted above "demonstrates that Congress was not referring to unreduced early retirement benefits (which are not mentioned) but to benefits

which are temporary or ancillary in nature (*e.g.*, medical or life insurance, disability benefits and social security supplements). . . ." (773 F.2d at pp. 1409, 1410)–was expressly endorsed by the district court in *Collins v. Seafarers Pension Trust*, 641 F.Supp. 297 in note 2.

III. THERE IS CONFLICT AMONG THE CIRCUITS CONCERNING THE APPROPRIATE DEGREE OF WEIGHT TO BE ACCORDED THE VIEWS OF THE INTERNAL REVENUE SERVICE WITH RESPECT TO THE STATUS OF UNREDUCED EARLY RETIREMENT BENEFITS AS PROTECTED ACCRUED BENEFITS.

The Third Circuit panel in *Ashenbaugh* was provided a copy of the Internal Revenue Service *amicus* brief in *Amato* as part of the Joint Appendix. The I.R.S. asserted in that brief that:

> The Internal Revenue Service, however, as the agency charged with the responsibility of enforcing the tax provisions of ERISA, has made an administrative determination that a full, *i.e.*, unreduced, early retirement benefit is an "accrued benefit" subject to the protections of §411 and the purpose of this brief is to advise the court of that determination.

The *amicus* brief further stated:

> The Internal Revenue Service (IRS), taking into account that the overriding goal of ERISA is the protection of employees' pension benefits, has determined that an early retirement benefit is an accrued benefit within the meaning of §411.

Internal Revenue Service regulations served as the forerunners of Code §401(a)(7) in 1962 and Code §411(d)(3) in 1974 which embodied the requirement that "benefits accrued" vest or become nonforfeitable upon a plan termination. It is thus all the more appropriate that its interpretation of the provisions of ERISA now at issue be given great weight. As the Fourth Circuit stated in *Babb v. Olney Paint Co.*, 764 F.2d 240 (4th Cir. 1985):

> With the advent of ERISA, a new factor of considerable importance for the interpretation and governance of profit sharing and pension plans appeared on the scene. While Internal Revenue Service rulings do not have binding effect upon courts faced with interpretation of such plans, nevertheless, the IRS's interpretations of a statute it administers are entitled "to great weight." *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 . . . : *Treadco Tires, Inc. v. United States*, 604 F.2d 14, 16 (5th Cir. 1979) (At p. 242).

A similar view was expressed by the Eleventh Circuit in *Blessitt v. Retirement Plan for Emp. of Dixie Eng.*, 848 F.2d 1164 (11th Cir. 1988):

> As the Supreme Court stated, "a court that tries to chart a true course to the Act's purpose embarks on a voyage without a compass when it disregards the agency's views. *Ford Motor Co. v. Milhollin*, 444 U.S. 555, 568 . . . (1980).
>
> * * *
>
> [(A)] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc*, 467 U.S. 837, 843 n. 11 . . . (1984). (848 F.2d at pp. 1167, 1168).

The Third Circuit panel in *Ashenbaugh* neither acknowledged the position of the I.R.S. with respect to the status of unreduced early retirement benefits as accrued benefits nor discussed the degree of weight to be properly accorded its views with respect to the interpretation of statutes it is responsible for administering. Instead, the panel's Opinion, (A.20), in the context of a discussion of a Code §411(d)(3) recovery, quotes the *amicus* brief of the P.B.G.C. even though that brief expressly asserted, at page two, that: "The PBGC's views in this case are limited to the proper interpretation and application of §4044."

In view of the lengthy history of I.R.S. Revenue Rulings requiring that unvested benefits, including an unreduced early retirement benefit, vest upon a plan termination, and Congress' knowledge and approval of such practices in the enactment of Code §401(a)(7) in 1962 and the successor Code §411(d)(3) in 1974, it was error for the court below to in effect dismiss as unreasonable the I.R.S. view that unreduced early retirement benefits are protected, accrued benefits.

IV. THERE IS CONFUSION AMONG THE CIRCUITS CONCERNING ERISA'S SECTION 4044 ALLOCATION OF ASSETS.

The Second Circuit in *Amato* and the Fourth Circuit in *Tilley* held that earned but unvested interests in an unreduced early retirement benefit were compensable through an allocation of assets pursuant to ERISA §4044(a)(6). The Third Circuit in *Ashenbaugh* held that such interests were not compensable through §4044.

An alternative argument of the Employees is based upon the proposition that a plan sponsor may create a plan which offers more than the minimum required by ERISA; that the sponsor could have incorporated in the Plan a narrow, limited concept of §4044 through language in the Plan, and the Summary Plan Description as well, that communicated an intention to either limit the application of that section to involuntary, complete Plan terminations; or to specify that only the first four or five category priorities of §4044 were to be effective upon a termination event.

Treasury Regulations §1.401-6(a)(i)(ii), and §1.411(d)-2 authorize flexibility with respect to both the timing and content of an allocation provision. The Plan

sponsor, however, did not choose to limit its incorporation of ERISA §4044 in the Plan. The Plan should be administered consistently with its language.

The Participants were informed, through the Summary Plan Description, that upon a termination, "Plan members will be fully vested in their rights under the Plan to the extent then funded in the order of preference specified in the Plan or by law." Article 12.1(b) expressly provides that upon a partial Plan termination, the trust assets "shall be allocated in accordance with the priorities established in §4044 of ERISA . . . "

V. THERE IS CONFUSION AMONG THE CIRCUITS CONCERNING THE QUESTION OF WHETHER ERISA SECTION 4044(d)(1)(A) AND TREASURY REGULATION SECTION 1.401-2 REQUIRE A PLAN TO SATISFY CONTINGENT, UNREDUCED EARLY RETIREMENT BENEFITS BEFORE RESIDUAL ASSETS OF THE PLAN MAY BE DISTRIBUTED TO THE EMPLOYER.

The Third Circuit in *Ashenbaugh* concluded that: "The sole purpose of §4044 is to marshall a plan's assets when those assets are insufficient to pay all of the benefits that the plan itself provides." 854 F.2d at page 1528, n. 13. *Amato* and *Tilley* concluded otherwise. The Eleventh Circuit in *Blessitt* viewed contingent or unvested benefits as liabilities which must be satisfied upon a plan termination.

ERISA §4044(d)(1) requires that "all liabilities of the plan to participants and their beneficiaries" be satisfied before residual assets may be distributed to the employer. Treasury Regulation §1.401-2 (November 20, 1960, amended April 14, 1964) is of a like nature. Section 12.1(d) of the Plan, in accordance with these requirements, provides that: "Any amount remaining in the trust

after the *full satisfaction of all liabilities* under the Plan shall be returned to the Company." (emphasis added)

Treasury Regulation §1.401-2, *"Impossibility of diversion under the trust instrument,"* requires that contingent liabilities of a plan-obligations to employees who have not yet completed the required years of service-be satisfied before plan funds may revert to an employer.

Subsection (b)(2) of Treasury Regulation §1.401-2 makes it clear that the liabilities that must be satisfied before a portion of plan assets may revert to the employer include contingent obligations for employees as well as fixed obligations. The subsection notes that:

> For example, if one thousand employees are covered by a trust forming part of a pension plan, three hundred of whom have satisfied all the requirements for a monthly pension, while the remaining seven hundred employees have not yet completed the required period of service, contingent obligations to such seven hundred employees have nevertheless arisen which constitute "liabilities" within the meaning of that term.

In commenting upon Treasury Regulation §1.401-2, the Eleventh Circuit's *en banc* opinion in *Blessit, supra,* noted that it

> . . . requires that the plan's fixed and contingent liabilities to employees both must be satisfied before any reversion can occur. Fixed liabilities are benefits that are vested when the plan terminates; contingent liabilities are benefits that are accrued but not yet vested when the plan terminates. These definitions have been consistently applied by the Internal Revenue Service and Treasury for more than thirty-five years. . . . (848 F.2d at p. 1170.)

The treatise, *Pension Claims: Rights and Obligations,* Stephen Bruce (B.N.A. 1988), notes that allowing "excess assets" to revert to the employer in effect permits a plan

to function as a "tax-free IRA" for the employer because of the deferral of taxation on earlier contributions and the tax exempt status of plan earnings. (At pp. 608-9) Bruce further notes that from 1980 to 1986, over 1,220 plans with 1,400,000 participants were terminated with reversions to sponsoring employers exceeding $12,000,000,000. (At p. 608)

CONCLUSION AND PRAYER FOR RELIEF

The granting of this Petition will provide the Court the opportunity to determine whether Congress, in enacting ERISA, intended to permit a plan which offered an unreduced retirement benefit at an age earlier than 65 (and which was funded accordingly) upon a plan termination (which makes it impossible for participants to satisfy all age or service requirements for such a benefit) to totally deny participants the portion of that benefit they had earned as of the plan termination, and return to the employer as "excess" plan funds, the tax exempt contributions that had funded such an unreduced early retirement. Consideration of the issues raised by this Petition would do much to clarify an area of law, of vital concern to millions of pension plan participants, that is presently in extreme disarray.

For the reasons set forth herein, this Petition for a Writ of Certiorari should be granted.

November 28, 1988

Respectfully submitted,

JAMES J. AHEARN
Counsel of Record

138 West Main Street
Ligonier, Pennsylvania 15658

(412) 238-7771

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3722

R. H. ASHENBAUGH, R. B. ANDREWS, R. L. APPELDORN, A. L. AUSTIN, J. D. BALSER, A. BARRASSO, J. O. BAUER, H. W. BIGLEMAN, C. R. BLAZIER, J. P. BRESSANELLI, G. BROWN, E. BUCAN, J. M. BURKE, J. R. BUTCHKO, E. C. CALVIN, R. R. CAMPBELL, P. D. CASTELLANO, D. R. CAULEY, J. L. CERASI, E. CHAPMAN, S. CHRISTY, P. R. CIANCONE, T. M. COSTELLO, T. J. CURRY, G. DAUKA, A. J. DeCOSTA, A. P. Di MARZIO, O. E. EDWARDS, E. P. ERATH, E. P. FAHNERT, H. FARRINGTON, J. S. FERRENCE, R. D. FEYDO, E. R. FINGER, C. E. FIX, JR., W. FRNAK, N. E. FREDERICK, J. P. FRENN, R. FRONKO, L. L. GIBBS, W. L. GLEASON, L. E. GORDON, J. E. GRIMM, P. E. GRUBBS, E. R. GUERRA, A. J. GULUTZ, J. T. HAAF, J. D. HAMACHER, JR., P. J. HANNON, R. M. HANSEN, M. I. HARPHAM, D. H. HELDMAN, G. W. HENGLEIN, J. K. HILE, R. T. HOPPER, H. M. HOWELL, J. B. ITZEL, JR., K. M. JANKE, C. L. JOBE, JR., K. H. JOHNS, R. O. JOHNSON, JR., L. M. JOHNSTON, E. T. JONES, R. KAO, D. P. KERR, JR., P. A. KEYS, R. W. KNALLEY, E. E. KNAPEK, W. J. KOFALT, S. W. KOHLER, T. KOMINITSKY, T. R. KRUPA, J. R. KUNDICK, W. LAKE, D. F. LANEVE, T. LEHMANN, R. H. LEWIS, R. A. LIPPERT, W. R. LIVINGSTON, A. J. LYNN, D. B. McCLAIN, J. L. McKAIN, E. L. MARSH, C. R. MARTSOLF, F. S. MATSUKAS, T. J. MAYTON, M. MITROVICH, M. A. MOLCHAN, A. N. MORRISON, H. MRAUNAC, M. R. MUCKIAN, C. W. MURRAY, III, C. J. MYERS, L. V.

NAGLE, E. ORDICH, W. H. ORR, A. J. PASKO, JR., M. E. PELLEGRINO, G. C. PASCION, G. V. PETERSON, R. F. PISANO, W. J. POPP, G. P. PORTO, G. POSTICH, D. E. POWELL, R. W. PRENTICE, J. PRESUTTI, W. C. PRICE, L. E. RAYKOVICS, T. R. REED, J. W. REIDER, M. J. ROSE, R. H. RUTTER, K. E. SANDERS, M. A. SARVER, P. K. SCHAKE, J. W. SCHOLTZ, W. T. SCOTT, J. G. SEMAN, A. H. SHELINE, M. L. SHERRY, F. R. SHUSS, W. W. SIMPSON, A. E. SIX, J. E. SMITH, E. H. SPAZIANI, W. H. STEPHENS, C. D. STROSNIDER, J. F. SUFFOLETTA, J. SUSICH, H. TAYLOR, F. S. THORNBERRY, JR., J. R. TICE, D. A. TOWNLEY, R. TRBOVICH, R. T. TURNER, R. R. VLAH, D. W. WARE, G. T. WEEKLEY, E. M. WERRIES, JR., J. A. WHITEHEAD, T. WILLIAMS, JR., T. H. WILLS, D. P. WOOD, A. J. YANNI, L. H. YOUNG, JR., R. C. YOUNG, H. F. YUTE, and W. I. ZAZWIRSKY,

Appellants

vs.

CRUCIBLE INC., 1975 SALARIED RETIREMENT PLAN

On Appeal From the United States District Court For the Western District of Pennsylvania (Pittsburgh) (D.C. Civil Action No. 86-1571)

Argued March 17, 1988

BEFORE: STAPLETON, MANSMANN, and HUNTER, *Circuit Judges*

(Opinion Filed August 23, 1988)

James J. Ahearn (Argued)
138 West Main Street
Ligonier, Pennsylvania 15658

Attorney for Appellants

William H. Powderly, III
Peter D. Post (Argued)
Martha Jo Wagner
Reed Smith Shaw & McClay
435 Sixth Avenue
Pittsburgh, Pennsylvania 15217

Attorneys for Appellee

Gary M. Ford
General Counsel
Carol Connor Flowe
Deputy General Counsel
Frank H. McCulloch
Acting Assistant
General Counsel
Jeanne K. Beck
Attorney
John Foster
Attorney

Pension Benefit Guaranty Corporation
Office of the General Counsel
2020 K Street, N.W.
Washington, D. C. 20006-1806

Attorneys for Amicus Curiae

OPINION OF THE COURT

STAPLETON, *Circuit Judge.*

In this ERISA action, the district court sustained the decision of the defendant Retirement Plan to deny certain benefits to the plaintiff participants, and the plaintiffs have appealed. Their main claim is that the Thirty-Year Retirement Benefits provided for in Plan § 4.3 are "accrued benefits" and that because the Plan was partially terminated, the length-of-service requirement specified as a prerequisite to the receipt of such benefits is suspended. Because we conclude that a participant does not become entitled to any benefit under the Thirty-Year Retirement provisions until the specified conditions of those provisions are met, we will affirm the judgment of the district court on that issue. We will also affirm the district court's decision with respect to plaintiffs' other claims, which concern the § 4.3(b) benefit limit, the § 4.1(d) 5% window benefit, and the allegedly improper administration of the Plan.

I.

Crucible, Inc. is a subsidiary of Colt Industries Operating Corporation (CIOC), which is in turn a subsidiary of Colt Industries, Inc. (Colt). The sole defendant here is the pension plan (the Plan) sponsored by CIOC for salaried, non-union employees of its steel-related operations, including a Crucible plant in Midland, Pennsylvania. Plaintiffs, former salaried, non-union employees at the Crucible Midland plant, are participants in the Plan. The Plan is a defined benefit, single-employer, qualified plan, subject to the vesting, funding, and participation requirements of the Internal Revenue Code (the Code)

and of ERISA, 29 U.S.C. § § 1001 *et seq.* (1982 & 1988 Supp.).

In March of 1982, Colt announced that it planned to dispose of the Crucible Midland plant. Colt began shutting the plant down in April of 1982. During the spring of 1982, Colt had hopes of selling the plant, and was negotiating seriously with a potential purchaser. The negotiations fell through, however, and production at the plant was halted by Colt on July 22, 1982. Colt announced its decision to permanently close the plant on August 16, 1982.

Several hundred Plan participants left Crucible involuntarily as a result of the plant shutdown. This exodus of employees was sufficient to result in a partial termination of the Plan, and in mid-1983, Colt obtained a determination from the Internal Revenue Service (the IRS) that the Plan was partially terminated as of July 31, 1982. The partial termination affected neither the qualification of the Plan for tax benefits nor the tax-exempt status of the trust in which Plan assets are held.[1]

The Plan Administrator, an employee of Colt, determined that the partial termination of the Plan entitled its participants to certain benefits but not others. The Retirement Committee, composed of officers of Colt and advised by Colt's counsel, agreed with the Administrator's determination.[2] The plaintiffs

---

1. There is no dispute that the Plan was partially terminated for purposes of ERISA as well as for tax purposes, though a partial termination under the Code may not in itself constitute a partial termination under ERISA. *See* 29 U.S.C. § 1343(b)(4); *United Steelworkers of America v. Harris & Sons Steel Co.*, 706 F.2d 1289, 1299 (3d Cir. 1983).

2. Under Plan § § 10.9 and 10.11, the Administrator is responsible for day-to-day administration of the Plan and for the determination of benefits due a participant. If a participant's claim is denied by the Administrator, the participant has the right under

did not, and, after exhausting their administrative remedies without success, filed this suit to compel payment of various additional benefits. There are 149 plaintiffs.

Plan participants who reach normal retirement age, defined in Plan § 1.1 as age 65, are entitled to normal retirement benefits determined in accordance with § 4.1 of the Plan. As required by ERISA, 29 U.S.C. § 1053, these normal retirement benefits vest within a limited time over the course of employment. No plaintiffs claim that they were improperly denied normal age-65 retirement benefits by the Plan. The only part of the normal retirement benefit provision which is in dispute here is § 4.1(d), a 1977 amendment which provides as follows for a 5% add-on:

> In the case of a Participant who retires on or after August 1, 1977 and before August 1, 1986, and who receives benefits determined with respect to Final Average Compensation and Final Salary under Sections 4.1(a) and (b) above without regard to the minimum benefit payable under Section 4.1 generally, such Participant's benefit shall be increased effective August 1, 1977 by five percent (5%) of the amount otherwise payable under Sections 4.1(a) and (b) determined without regard to this subsection.

Plan § 10.11 to request that the Retirement Committee review the Administrator's determination. It is the Retirement Committee which has final control over the administration of the Plan. Not only is the Administrator a designee of the Committee, but the Administrator's determination of the amount and method of any payment to any participant is subject to the Committee's approval under Plan § 12.1(e). The Administrator and Committee members all fall within ERISA's definition of a fiduciary, 29 U.S.C. § 1002(21)(A), since they exercise discretionary authority in managing the Plan. The members of the Retirement Committee are named fiduciaries of the Plan. Plan § 10.1; 29 U.S.C. § 1102(a).

App. at 84. This type of benefit, called a "window benefit," is used by employers to encourage employees able to retire during a particular time period to do so.

Plan § 4.3 sets forth Thirty-Year Retirement Benefit provisions applicable to participants with a requisite number of years of service. If a Plan participant has 30 years of service and is 62 or over, § 4.3(a) allows that person to retire and receive the full benefits to which he or she would be entitled if he or she were to wait and retire at age 65. If a participant has 30 years of service but is not yet 62, § 4.3(b) provides that that person may retire with benefits calculated in any of several ways; although these benefits generally would be greater than those available to that person if he or she retired early and were covered only by the normal age-65 retirement provision, they are limited in a way § 4.3(a) benefits are not. The text of Plan § 4.3 reads in relevant part:

> 4.3 *Thirty Year Retirement.* Subject to the minimum specified in Section 4.1, the annual retirement benefit payable to a Participant who shall retire on a Thirty Year Retirement Date, from said Date for the remainder of his life, shall be whichever one of the following is applicable:
>
> (a) If the participant has attained age sixty-two (62), an annual retirement benefit computed in accordance with subdivisions (i) and (ii) of subsection (a) of Section 4.1, or
>
> (b) If the Participant has not attained age sixty-two (62), an annual retirement benefit which shall be the greatest of:
>
> (i) the annual retirement benefit computed in accordance with subdivisions (i) and (ii) of subsection (a) of Section 4.1, limited to the Annual Amount set forth in Schedule I below applicable to

the date of the Participant's retirement multiplied by the total number of years . . . of Credited Service, or

(ii) the annual retirement benefit equal to the sum of such Participant's Accrued Benefit and the amount computed in accordance with subdivisions (i) and (ii) of subsection (a) of Section 4.1, utilizing Future Service in lieu of Credited Service for the purpose of such computation, limited to the Annual Amount set forth in Schedule I below applicable to the date of the Participant's retirement multiplied by the total number of years . . . of Future Service.

SCHEDULE I
Applicable to (i) and (ii)

Retirement *on or after*	Annual *Amount*
January 1, 1978	$275
January 1, 1982	$462

or

(iii) the immediate annual retirement benefit or deferred retirement benefit computed in accordance with Section 4.4 if, at the time of Retirement under this subsection (b), the Participant had attained age fifty-five (55).

App. at 84-85.[3]

---

3. The plaintiffs have restated the benefit limit of § 4.3(b)(i) and (ii) as a limit on the annual salary which may be taken into account when determining Thirty-Year Retirement Benefits for retiring participants with 30 years of service who are not yet 62. Plaintiffs therefore refer to this benefit limit as a cap on creditable salary; their calculations place the maximum creditable salary at $42,000. Although the Plan objects to the plaintiffs' recharacterization of the § 4.3 benefit limits as a cap, we do not see that it makes any

Plan § 4.4 provides for early retirement at age 55. A participant may retire at 55 or thereafter and defer receipt of pension payments until he or she reaches age 65, at which time he or she will receive full benefits determined under § 4.1. An early retiree may in the alternative elect to begin receiving § 4.1 benefits immediately, in which case the benefits will be reduced by .5% for each month shy of 65 the retiree is at the time of early retirement.

The Plan makes separate provision for employees who are terminated as opposed to retiring voluntarily. Under § 5.2(a) of the Plan, employees terminated before age 55 are to receive either their "annual retirement benefit commencing at age sixty-five (65) . . . subject to the minimum specified in and computed in accordance with the provisions of § 4.1," or, under § 5.2(b), an annual benefit commencing at early retirement age under § 4.4, but reduced as provided under that section. Under § 3.2, "[a]ny participant who terminates entitled to a benefit by reason of Section 5.2 shall hereinafter be called a 'Deferred Vested Participant.'" App. at 76.

A final pertinent Plan provision is § 12.1, which states that:

> (b) In the event of termination or partial termination of the Plan, the assets of the trust under the Plan shall be allocated in accordance with the priorities established in Section 4044 of ERISA [29 U.S.C. § 1344(b)] (or any successor statutory provision).
>
> (c) In the event of "termination" or "partial termination" of the Plan (as those terms are used in Section 411(d)(3) of the Internal Revenue Code,

---

difference whether § 4.3(b)(i) and (ii) are viewed as imposing benefit limits or as capping creditable salary and will therefore refer to the provision in either fashion.

> or any successor statutory provision) the rights of the Participants, Beneficiaries and Contingent Annuitants to benefits accrued to the date of such termination or partial termination, to the extent funded as of such date, shall be nonforfeitable.

App. at 119.

The most important claim made by the plaintiffs under the above Plan provisions is that those plaintiffs who lacked 30 years of service at the time of their termination are entitled to a portion of the Thirty-Year Retirement Benefits even though, because they lacked 30 years of service at the time of their termination, they have not met, and will never meet, the length-of-service condition set by the Plan for receipt of such benefits.[4] The plaintiffs make two arguments in support of this claim. The first is that the right to computation of payments under the Thirty-Year Retirement provisions is an "accrued benefit," and that, in the context of a partial plan termination, § 12.1(c) of the Plan has the effect of dispensing with the requirement that one

---

4. Plaintiffs' position is well summed up in ¶ 14 of their complaint:

> The Plan arbitrarily and capriciously calculated the accrued benefits payable to the participants upon the partial termination of the Plan, on the basis of the portion of the age-65 pension benefit, rather than on the basis of the portion of the more valuable 30-year pension benefit the participants had earned as of the date of their involuntary termination of employment and thus offered the participants the same drastically reduced pension they would have been entitled to had they terminated their employment voluntarily prior to attaining 30 years of service.

App. at 11. We stress that none of the plaintiffs who are claiming that Thirty-Year Benefits were wrongly denied them had in fact served for 30 years prior to the termination of their employment. All Plan participants who had 30 years of service at the time of their termination and who requested Thirty-Year Benefits under Plan § 4.3 were granted such benefits. This is clear from the benefit claims that plaintiffs made to the Plan and its response thereto.

serve for 30 years before becoming entitled to Thirty-Year Benefits. In response, the defendant Plan points out that there is no Plan provision stating or even suggesting that Thirty-Year Benefits can accrue before the length-of-service requirement is met, and that therefore such benefits cannot accrue until fulfillment of that requirement.[5] The Plan further maintains that Thirty-Year Retirement Benefits are a "retirement-type subsidy" rather than a retirement or early retirement benefit; according to the Plan, the Thirty-Year Benefits can be so described since they in essence provide that participants meeting the conditions will get normal retirement benefits plus an additional amount which is a subsidy.[6]

The other argument made by the plaintiffs in support of their claim to Thirty-Year Benefits is that in the event of partial termination, § 12.1(b) of the Plan,

---

5. According to the defendant:

> The right to a subsidized early retirement benefit becomes non-forfeitable upon fulfillment of the conditions in the plan and it is at the same time that the subsidized early retirement benefit accrues. Prior to that time the benefit is but an expectation.

Appellee's Brief at 27 n.11.

6. As discussed below, the legislative history of recent amendments to the Internal Revenue Code provisions governing pension benefits is relevant to the question of how a "benefit subsidy" is defined. *See infra* note 12 and accompanying text. A benefit subsidy is there defined as the excess in value of a benefit over the actuarial equivalent of the normal retirement benefit. Here, early recipt of the normal retirement benefits would, under the terms of the Plan, entail considerable actuarial reduction. The Thirty-Year Benefit provision frees a retiree with 30 years of service from that reduction; even where the § 4.3(b) cap applies, the Thirty-Year Benefits still have value in excess of the amount that would be available to a retiring employee under the comparable actuarially-reduced normal retirement benefit provisions. We agree with the defendant that this excess value is a subsidy.

by incorporating § 4044 of ERISA, 29 U.S.C. § 1344, operates to create a right in the Thirty-Year Benefits offered by the Plan. The Plan contends that § 4044 creates no substantive right to benefits, and that because the Plan is fully funded, neither § 4044 of ERISA nor Plan § 12.1(b) have any application here.

A second claim is asserted by those plaintiffs who had 30 years of service but were not yet 62 years old when they were terminated. At issue here is the benefit limit or salary cap set forth in Plan § 4.3(b), which was applied by the Plan in determining the benefits to which these plaintiffs were entitled. The plaintiffs contend that because they were terminated involuntarily and so did not have a chance to work until age 62, the benefit limit should not be used in determining their benefits. The Plan's response is that there is no reason to ignore the clearly-stated benefit limit of § 4.3.[7]

A third and final claim to additional benefits is made by those plaintiffs who had not reached age 55 at the time of their termination, and whose termination fell within the § 4.1(d) window period. These plaintiffs

---

7. Apparently not yet in dispute at the time this action was filed is the related question of whether employees with 30 years of service who were not yet 62 at the time of their termination and request for benefits and whose benefits were therefore subject to the § 4.3(b) cap would, *when they subsequently attained age 62*, become entitled to receive benefits calculated under § 4.3(a), without reference to the cap. The plaintiffs do raise this issue in their brief, albeit in somewhat hypothetical terms. *See* Appellants' Brief at 9, 23. However, it is not asserted that the Plan has made a determination of this issue -- nor that the Plan has been asked to do so by any participant. In addition, this issue, quite properly, was not addressed by the district court. In light of these circumstances, we cannot address this question at this point. *See Zipf v. American Tel. & Tel. Co.*, 799 F.2d 889, 892 (3d Cir. 1986) (participants claiming unjust denial of benefits must first address their complaints to plan fiduciaries); *Wolf v. National Shopmen Pension Fund*, 728 F.2d 182, 185 (3d Cir. 1984) (same).

were found entitled to deferred vested benefits under § 5.2, but were not given the 5% add-on provided for by § 4.1(d). In the Plan's view, because these plaintiffs could not at the time they were terminated have taken advantage of any retirement option provided by the Plan, they were not covered by a provision applicable to any participant "who retires" within the window period.

In addition to the above claims to additional benefits,[8] the plaintiffs assert that the fashion in which the Plan was administered was so in conflict with ERISA as to require the court to invalidate the Plan fiduciaries' denial of the plaintiffs' claims to additional benefits. The plaintiffs cite as defects in administration of the Plan that the Plan fiduciaries relied on Colt's counsel rather than hiring independent counsel; that the fiduciaries did not at the time of the partial termination conduct a general review of benefits payable; that the fiduciaries did not give the participants written notice of the decision to seek IRS approval of partial plan termination and of "the significance ordinarily associated with such an event"; and that the fiduciaries failed to respond adequately to the participants' requests for information about the funding and administration of the Plan and for access to Plan files and records. The Plan contends that the fiduciaries acted properly and fulfilled all responsibilities owed to the plaintiff participants.

---

8. An additional issue raised by the plaintiffs before the district court, though not mentioned in their complaint, concerns 23 plaintiffs who were terminated shortly before the official date of partial plan termination and who were found by the Plan not to have been terminated as a result of the plant shutdown. The plaintiffs contended, and continue to assert on appeal, that these 23 participants should fall within the protection of § 12.1(c). In light of our holding, we need not address this issue: § 12.1(c), as we view it, would provide no additional protection to these already fully vested plaintiffs.

The district court, concluding that the plaintiffs had not shown the administrators' interpretation of the Plan to be arbitrary and capricious and that plaintiffs' claims regarding ERISA violations were meritless, found in favor of the Plan on every claim. Both parties had moved for summary judgment; the court granted the Plan's motion, and denied that of the plaintiffs.

On appeal, plaintiffs contend that the district court erred both in its assessment of the relevant legal and Plan provisions, and in its use of the arbitrary and capricious standard to evaluate the decisions of the Plan fiduciaries. They seek reversal of the summary judgment in favor of the Plan, and the entry of summary judgment in their favor. We have jurisdiction pursuant to 28 U.S.C. § 1291; because this is an appeal from a grant of summary judgment, review is plenary. *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 330 (3d Cir. 1984).

II.

The standard of conduct courts have ordinarily used when reviewing an ERISA fiduciary's interpretation and administration of a plan is that the fiduciary may not act in an arbitrary and capricious manner. *See Rehmar v. Smith*, 555 F.2d 1362, 1371 (9th Cir. 1977); *Gaines v. Amalgamated Ins. Fund*, 753 F.2d 288, 289 (3d Cir. 1985). After the initial decision of the district court in this case, however, this court held in *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134 (3d Cir. 1987), that where the interests of the plan fiduciaries are adverse to those of the plan beneficiaries, the fiduciaries' decisions in administering the plan should not be given the deference usually accorded but should instead be reviewed with more care, using general principles of contract interpretation. The plaintiffs in this case

moved for reconsideration by the district court in light of *Bruch*, but their motion was denied. The Supreme Court has since granted certiorari in *Bruch*, 108 S. Ct. 1288, 56 U.S.L.W. 3676-77 (Apr. 5, 1988), in part on the question of the proper scope of judicial review of decisions made by ERISA fiduciaries.

We assume without deciding that the higher standard of scrutiny required in *Bruch* applies to this case.[9] Even if we do not give the Plan administrators' interpretation of the Plan the deference to which it would customarily be entitled, as will be clear from the following analysis of each of the plaintiffs' claims, we reach the same conclusions on the law and on the proper interpretation of Plan provisions as did the Plan administrators. Thus, whether or not *Bruch* was correctly decided is not material to the outcome of this case.

III.

We first address the main issue presented, that of whether the defendant's denial of Thirty-Year Retirement Benefits may be sustained. Plaintiffs' argument that it may not rests on two sections of the Plan, § 12.1(c) and § 12.1(b), and on the statutory provisions upon which these two sections are based.

9. Colt does have an interest in the funds retained by the Plan on account of denial of the benefits claimed by these plaintiffs, as these funds at some point either will revert to Colt, as permitted by ERISA, 29 U.S.C. § 1344(d)(1), and Plan § 12.1(d), see *Chait v. Bernstein*, 835 F.2d 1017, 1026 (3d Cir. 1987), or will allow Colt to reduce its future contributions to the Plan. We also note that all three members of the Retirement Committee, which controls the administration of the Plan, are senior members of Colt's management; while the officers, employees, and agents of an employer are specifically permitted by ERISA to serve as fiduciaries of the employer's pension plan, see 29 U.S.C. § 1108(c)(3), the interests of senior management of an employer may be identified with the employer's own interests rather than with the interests of the beneficiaries.

Code § 411(d)(3) and ERISA § 4044 respectively. In our view, the plaintiffs' argument not only misconstrues these Plan provisions and the relevant law, but misperceives their purposes as well.

A. *Plan § 12.1(c)*

The provisions of Plan § 12.1(c) must be part of a plan if the trust in which plan assets are held is to be tax-exempt. Under the Code,

> a trust shall not constitute a qualified trust . . . unless the plan of which such trust is a part provides that . . . upon its termination or partial termination . . . the rights of all affected employees to benefits accrued to the date of such termination [or] partial termination, . . . to the extent funded as of such date . . . are nonforfeitable.

§ 411(d)(3). The plaintiffs state repeatedly that this Plan section and this Code provision are what entitle them to Thirty-Year Benefits. They say, for example:

> The Participants . . . seek nothing more than the implementation of Plan § 12.1(c) . . . . The occurrence of the rare event of a partial plan termination triggers § 12.1(c) of the Plan and requires that the age and service requirements otherwise applicable be superseded.

Appellants' Reply Brief at 3-4; *see also* Appellants' Brief at 18 ("no rewriting of the Plan is necessary [as] Plan Article 12.1(c) provides all the writing needed"); Reply Brief at 7 (stating that plaintiffs are "governed" by § 411(d)(3)).

Plan § 12.1(c) must be read in the context of ERISA as a whole, however. Under ERISA, the concepts of accrued benefits and vested (i.e. non-forfeitable) rights are quite distinct. In *Hoover v. Cumberland, M.D. Area Teamsters Pension Fund*, 756 F.2d 977 (3d Cir.

1985), we began by explaining the concept of "accrued benefits:"

> ERISA's statutory definition of "accrued benefits" imparts a specific meaning to the word accrued, connoting a set periodic increase or accumulation. Section 3(23) states that an accrued benefit is an individual's benefit "expressed in the form of an annual benefit commencing at normal retirement age." 29 U.S.C. § 1002(23)(A). ERISA's definitional counterpart for accrued benefit in the Internal Revenue Code, 26 U.S.C. § 411(a)(7)(A)(i), is identical, and has been interpreted by the Internal Revenue Service in a Technical Information Release:
>
> > [I]n the case of a defined benefit plan, the "accrued benefit" must be expressed in the form of an annual benefit commencing at normal retirement age. The plan must provide a formula under which each participant's actual accrued benefit under the plan can be determined in each plan year.
>
> Internal Revenue Service T.I.R. No. 1403 (Sept. 17, 1975). An accrued benefit, then, represents the interest in a retirement benefit that a participant earns each year, and a plan must state a method or formula for determining a participant's annual accrual rate. This requirement enables a worker to mark his or her progress toward the full pension benefit due at retirement.

756 F.2d at 981-82 (footnotes omitted).

We then contrasted "accrued benefits" with "vested" or "non-forfeitable" rights:

> The concepts of accrued on the one hand, and vested or "nonforfeitable", on the other, are related, but not the same. A participant becomes

> fully vested when he gains a nonforfeitable right to receive his entire accrued benefit. Vesting provisions do not affect the amount of the accrued benefit, but rather govern whether all or a portion of the accrued benefit is nonforfeitable. Accrual provisions provide a formula for calculating the amount of the normal retirement benefit which an employee has earned at any given time.

Id. at 983-84 (footnotes omitted). Rights must vest under a qualified plan within a relatively short term of years (presently fifteen and soon seven, see Code § 411(a)(2); 29 U.S.C. § 1053), while "accrued benefits" continue to accrue throughout the employee's service.

As we will discuss hereafter, the parties here disagree on whether the Thirty-Year Benefit falls within the statutory definition of an "accrued benefit." We will assume for the moment that it does come within that definition and that it is thus to be treated in the same manner as the normal retirement benefit. As we have seen, an employee's accrued benefit at any particular point in time is what a fully vested employee would be entitled to receive under the terms of the plan if employment ceased at that particular point in time. Here, the Plan provides that an employee is entitled to receive Thirty-Year Retirement Benefits only when he or she retires on a "Thirty-Year Retirement Date", i.e., only after having given 30 years of service. Thus, even if the Thirty-Year Benefit is to be treated as an accrued benefit, it does not "accrue" for any employee until he or she has given 30 years of service.[10]

---

10. We also note that the Thirty-Year Benefit does not accrue over time in one of the three methods required by ERISA in the case of an "accrued benefit." *See* 29 U.S.C. § 1053(a). Thus, if the Thirty-Year Benefit were actually to come within ERISA's definition of "accrued benefit", the Plan would not qualify. Nevertheless, we believe the Plan qualifies because the Thirty-Year Benefit is not within that definition.

Plaintiffs acknowledge that they would not be entitled to any Thirty-Year Benefit if it were not for § 12.1(c) and the fact that their employment ceased in the course of a partial termination. It is the partial termination and § 12.1(c), they say, that "require[] that the age and service requirements otherwise applicable be superseded." But § 12.1(c), and Code § 411(d)(3) which it implements, have nothing to do with altering the conditions under which accrued benefits will accrue. As is apparent from their face, their purpose is to guarantee to employees who would not otherwise have any vested right to any pension benefits at the time of a plan termination or partial termination that they will be treated as having a fully vested right to any benefits that have accrued and are funded. Thus, for example, if a plan provides for 100% vesting of accrued benefits after ten years of service and a participant leaves the employer within ten years of being hired, he or she will not be entitled to any accrued benefits. On the other hand, if the participant were terminated from service in the course of an event giving rise to a termination or partial termination of the plan, he or she, by virtue of the provision which all plans are required to contain by Code § 411(d)(3) in order to qualify for valuable tax advantages, would be entitled to 100% of his or her accrued benefits. *See Weil v. Retirement Plan Admin. Comm.*, 750 F.2d 10, 11 (2d Cir. 1984) ("Because [employer] terminated both [participants] before either had completed ten years of service, neither of them was entitled to any non-vested benefits -- unless their termination occurred pursuant to a partial termination of the [employer's] Plan").

Section 411(d)(3) and Plan § 12.1(c) are thus vesting provisions only. As such, they have nothing whatever to do with the rights of fully vested employees like the plaintiffs in this case, and we are at a loss to understand plaintiffs' argument that these provisions

somehow require the Plan to give them benefits they do not claim are provided by the other terms of the Plan. We therefore decline to accept plaintiffs' contention with respect to the effect of § 12.1(c).[11]

We also find it significant that the Pension Benefit Guarantee Corporation (PBGC) considers plaintiffs' argument regarding their entitlement to Thirty-Year Benefits as unfounded as we do. While most of its *amicus* brief is devoted to the subject of the proper interpretation of § 4044 of ERISA, discussed below, the PBGC also takes the position that:

> [Plaintiffs'] claim to additional benefits pursuant to Section 4.3(a) of the Plan is insupportable. That Section provides unreduced retirement benefits only to participants who have attained age 62 and completed 30 years of service. Appellants did not satisfy these conditions on July 31, 1982, when the partial termination occurred, and, because they lost their jobs when the Midland plant shut down, may never satisfy them. The Plan does not take post-termination events, such as the satisfaction of the age requirement, into account, and does not promise to grant participants credit for service never performed. And, certainly, it nowhere provides that the "age and service requirements . . . were removed upon the occurrence of [the] Plan termination," as appellants contend.

---

11. In an effort to make the asserted relevance of § 12.1(c) more plausible, plaintiffs at times seem to suggest that Thirty-Year Benefits accrue from the time of employment on pursuant to an implied provision of the Plan at a rate in proportion to years of service and that the reason they would not be entitled to some portion thereof in the absence of a partial termination is that, absent some form of plan termination, such benefits do not vest until one has given 30 years of service. This is obviously a skewed interpretation of a plan clearly intended to meet the requirements of ERISA and the Code. As we have noted, for a plan to comply with those statutes, accrued benefits must vest within 15 years.

PBGC *Amicus Curiae* Brief at 9.

We therefore believe the issue posed by plaintiffs -- i.e., whether Plan § 12.1(c) or Code § 411(d)(3) require the payment to them of Thirty-Year Benefits -- can be resolved without determining whether early retirement benefits of the sort in dispute here can ever be properly classified as an "accrued benefit." Even if we were required to reach that issue, however, we could not agree with plaintiffs that Thirty-Year Benefits are within the statutory definition of an "accrued benefit."

Both the Code and ERISA define the term "accrued benefit" as:

> in the case of a defined benefit plan, the [individual employee's] accrued benefit determined under the plan and . . . expressed in the form of an annual benefit commencing at normal retirement age.

§ 411(a)(7)(A)(i); 29 U.S.C. § 1002(23) (emphasis added).

Plaintiffs insist that the Thirty-Year Benefit is an early retirement benefit that falls within this definition. They find support for their position in *Amato v. Western Union Int'l Inc.*, 773 F.2d 1402 (2d Cir. 1985), *cert. dismissed* 474 U.S. 1113 (1986). The issue in *Amato* was the validity of a plan amendment reducing early retirement benefits for which plaintiff participants were or would have become eligible; the court decided that such a reduction would be impermissible under ERISA § 204(g), 29 U.S.C. § 1054(g), which forbids the reduction of "accrued benefits" by the plan amendment. While § 1054(g) does not cover partial terminations and so would not apply here, *Amato*'s definition of "accrued benefits" is the definition which the plaintiffs contend should be applied to determine the scope of coverage of Plan § 12.1(c).

This court has, however, disagreed with *Amato* on the very issue of whether early retirement benefits are

"accrued benefits" in the context of plan amendment. In *Bencivenga v. Western Pennsylvania Teamsters & Employers Pension Fund*, 763 F.2d 574, 577 (3d Cir. 1985), we held that early retirement benefits did not fall within the definition of "accrued benefits," and were therefore not protected by § 1054(g). *Bencivenga* stands as precedent in this circuit, and we are not free to adopt plaintiffs' position that *Amato* rather than *Bencivenga* should be followed here. In any case, we think *Bencivenga* better law. One important point on which *Amato* and *Bencivenga* part company, and as to which we think *Bencivenga* correct, is the significance of the following language from ERISA's legislative history:

> In the case of a defined benefit plan the bill provides that the accrued benefit is to be determined under the plan, subject to certain requirements. The term 'accrued benefit' refers to pension or retirement benefits and is not intended to apply to certain ancillary benefits, such as medical insurance or life insurance . . . . Also, the accrued benefit to which the vesting rules apply is not to include such items as the value of the right to receive benefits commencing at an age before normal retirement age, or so-called social security supplements . . . .

H.R. Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4670, 4726; *see also* H.Conf. Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5054. The *Amato* court was of the view that this passage has nothing to do with early retirement benefits, and thus "sheds no light on the meaning to be given to the term 'accrued benefit' in the present context." 773 F.2d at 1410. *Bencivenga*, however, quoted and relied on this passage in

connection with claims to early retirement benefits, as did *Hoover* and as have a number of other courts. *See, e.g., Shaw v. International Ass'n of Machinists and Aerospace Workers Pension Plan*, 750 F.2d 1458 (9th Cir. 1985), *cert. denied* 471 U.S. 1137 (1985) (quoting and relying on the above passage in holding that amendment that eliminated the cost-of-living increase in a "living pension" feature of a plan was elimination of an accrued benefit); *Sutton v. Weirton Steel Div'n of Nat'l Steel Corp.*, 567 F. Supp. 1184, 1196 (N.D.W.Va. 1983), *aff'd* 724 F.2d 406 (4th Cir. 1983), *cert. denied* 467 U.S. 1205 (1984) (relying on quoted legislative history in holding that certain retirement benefits were conditional and in the nature of early retirement benefits and so could not be considered accrued benefits); *Petrella v. NL Industries, Inc.*, 529 F. Supp. 1357 (D.N.J. 1982) (holding that elimination of early retirement option did not violate ERISA because benefits under that option did not accrue nor were they vested so as to be protected against forfeiture). *But see Collins v. Seafarer Pension Trust*, 641 F. Supp. 293, 296 (D.Md. 1986) (declining to follow *Hoover* and *Bencivenga*, and holding a funded, noncontingent early retirement benefit to be "an integrated part of a retirement plan" and within the scope of accrued benefits protected in case of plan amendment). In our view, this legislative history is contrary to the plaintiffs' position here, just as it was in *Bencivenga*.

We take *Bencivenga* and the other caselaw cited above to support the proposition that in 1982, when the partial termination of CIOC's Plan occurred, Thirty-Year Benefits were not within the statutory definition of an accrued benefit and that, for this additional reason, Plan § 12.1(c) did not make Thirty-Year Benefits available to plaintiffs.

Subsequent developments in this area of the law provide additional support for this conclusion. Since

1982, Congress, in the Retirement Equity Act of 1984, has provided as follows:

> (A) . . . A plan shall be treated as not satisfying the requirements of this section if the accrued benefit of a participant is decreased by an amendment of the plan. . . .
>
> (B) . . . For purposes of subparagraph (A), a plan amendment which has the effect of --
>
> > (i) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
> >
> > (ii) eliminating an optional form of benefit,
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy.

Code § 411(d)(6) (effective for plan years beginning after Dec. 31, 1984). Each side in this case relies upon this provision for support of its position. The plaintiffs argue that it represents a congressional acceptance of the *Amato* court's interpretation of the state of the law prior to the amendment. As we pointed out in *Bencivenga*, 763 F.2d at 577, however, elsewhere the Act's legislative history states that:

> The bill clarifies the scope of the prohibition against such decreases [in accrued benefits]. The committee intends that no inference is to be made on the basis of this clarification as to the scope of the prohibition before the effective date of the provision.

S. Rep. No. 575, 98th Cong., 2d Sess. 28, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2547, 2574.

As we have indicated, we do not believe the pre-1984 law regarded all amendments eliminating early retirement benefits, retirement-type subsidies, or other optional benefits, or reducing early retirement benefits or retirement-type subsidies, as being amendments affecting accrued benefits. But the fact that such amendments will now be "treated as reducing accrued benefits" does not mean that Congress intends to foreclose employers from circumscribing the availability of such optional benefits when they are being created.

Even if § 411(d)(6) reflected the state of the law in 1982, it would require that we sustain defendant's, rather than plaintiffs', position regarding the Thirty-Year Benefits. While this provision makes it clear that the amendment of a plan to reduce early retirement benefits is impermissible because it must be treated as an amendment reducing "accrued benefits," § 411(d)(6) also excludes from full "accrued benefits" protection any "retirement-type subsidy." It is apparent from the legislative history of the 1984 Code amendment that benefits like the Thirty-Year Benefits offered by this Plan are a retirement-type subsidy, and are therefore a benefit to which participants are not entitled unless relevant conditions are met. According to the legislative history,

> the bill makes it clear that the prohibition against reduction of a benefit subsidy (the excess of the value of a benefit over the actuarial equivalent of the normal retirement benefit) applies to a participant only if the participant meets the conditions imposed by the plan on the availability of the subsidy. If the protection is afforded, an employee's accrued benefit is not to be less than

> the protected level or the accrued benefit determined under the plan without regard to the protection, whichever is greater. For example, if a plan is amended to eliminate a subsidized early retirement benefit for employees who have completed 30 years of service, then the plan would not be required to provide the subsidy to an employee who never completes 30 years of service, and it would not be required to provide benefits to such an employee before the normal retirement age. On the other hand, if the employee completes 30 years of service, then the employee's accrued benefit is not to be less than the protected level or the accrued benefit determined without regard to the protection, whichever is greater.

S. Rep. No. 575, *supra*, at 28, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2547, 2574.[12] The excess of

12. The amendment also provides that the term "retirement-type subsidy" is to be defined by Treasury regulations; no such regulations have yet been promulgated or proposed. The IRS has, however, issued a ruling on this amendment, which states in part:

> Section 411(d)(6)(B) provides that, in the case of a retirement-type subsidy, this prohibition [against reducing "accrued benefits" by plan amendment] applies only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. . . .
>
> . . . A participant could, after the date of the proposed termination, satisfy the pretermination conditions necessary to receive this retirement-type subsidy. . . .

Rev. Rul. 85-6, 1985-1 C.B. 133, modifying and superseding Rev. Rul. 83-52, 1983-1 C.B. 87. The IRS has therefore recognized, as the amendment's legislative history requires it to do, that to be entitled to receive a contingent retirement-type subsidy like that in dispute here, a participant must meet the specified contingencies. While some conditions may be satisfied by an employee after his or her termination, a length-of-service requirement clearly cannot.

the value of the Thirty-Year Benefit over the actuarial equivalent of the normal retirement benefit is precisely what the plaintiffs in this case seek and have been denied. We conclude from this that the Thirty-Year Benefits at issue here are "retirement-type subsidies," and as such would not accrue until the conditions imposed by the Plan on their availability are fulfilled.

To sum up: while § 411(d)(6) is not directly applicable here, it indicates that the Thirty-Year Benefit would be considered a retirement-type subsidy and not an "accrued benefit" that cannot be altered. But even disregarding that section, the fact remains that existing law in this circuit at the time of partial termination of the Plan is squarely against the view that the Thirty-Year Benefit was within ERISA's definition of an "accrued benefit." Finally, even if the Thirty-Year Benefit were considered an accrued benefit, Plan § 12.1(c) would not have the effect of superseding the age and service requirements of the Plan. It follows that the Plan fiduciaries' denial of Thirty-Year Benefits must be sustained.

B. *Plan § 12.1(b)*

A secondary holding of *Amato* relates to the plaintiffs' other argument on this issue, which is that ERISA § 4044, 29 U.S.C. § 1344(a), and § 12.1(b) of the Plan entitle them to Thirty-Year benefits. We again disagree with *Amato*, and affirm the district court's holding in this case that ERISA § 4044 is an ordering provision rather than one that creates substantive rights.[13]

The statute reads in part as follows:

§ 1344. Allocation of assets

---

13. We agree with the district court that "[t]he sole purpose of § 4044 is to marshal a plan's assets when those assets are insufficient to pay all of the benefits that the plan itself provides." App. at 196 n.1.

(a) Order of priority of participants and beneficiaries

In the case of termination of a single-employer defined benefit plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:

(1) First, to that portion of each individual's accured [sic] benefit which is derived from the participant's contributions to the plan which were not mandatory contributions.

(2) Second, to that portion of each individual's accrued benefit which is derived from the participant's mandatory contributions.

. . .

(4) Fourth --

(A) to all other benefits (if any) of individuals under the plan guaranteed under this subchapter . . .

(5) Fifth, to all other nonforfeitable benefits under the plan.

(6) Sixth, to all other benefits under the plan.

Amato held that § 1344(a)(6) entitled participants of a fully-funded plan to receive contingent benefits even though the specified contingencies had not occurred. *See* 773 F.2d at 1415-16. The Fourth Circuit has followed *Amato*'s interpretation of § 1344(a), in *Tilley v. Mead Corp.*, 815 F.2d 989 (4th Cir. 1987).

The Eleventh Circuit, however, has disagreed, holding in *Blessitt v. Retirement Plan for Employees of Dixie Engine*, No. 86-8123, slip op. at 3642, (11th Cir. July 8, 1988) (in banc), that "the plain language of the Section 1344 allocation provisions" clearly specifies that those provisions extend only to benefits calculated

in accordance with the terms of the retirement plan. For that reason, the *Blessitt* court concluded that employees were not entitled by ERISA to "receive a benefit which is calculated on the basis of anticipated future years of service which have not actually been worked as of the termination date," where the plan did not so provide. This holding is squarely against the plaintiffs in this case, who make an identical claim under § 1344. In addition, both the IRS and PBGC oppose *Amato*'s and the plaintiffs' interpretation of § 1344(a). In its amicus brief in this case, the PBGC states that:

> Section 4044 . . . is not a benefit accrual or vesting provision, and does not create any substantive right to benefits not otherwise provided for under the terms of a plan or elsewhere in ERISA. It merely orders the priorities for allocating plan assets to benefits already accrued under the terms of a plan as of the date of plan termination. . . . [T]he primary purpose of Section 4044 is "[t]o protect against evasion of the . . . limits on [PBGC] insurance benefits by use of pension fund assets first to pay uninsured benefits."

PBGC *Amicus Curiae* Brief at 5-6 (quoting legislative history of § 4044).[14] We think it clear that ERISA § 4044, 29 U.S.C. § 1344, does not create a right in early retirement benefits, but only sets priorities to be applied in cases where plan funds are not sufficient.[15]

---

14. The in banc Eleventh Circuit opinion in *Blessitt* reached the opposite conclusion from the panel decision, 817 F.2d 1528 (11th Cir. 1987), *vacated* 836 F.2d 1571 (11th Cir. 1988). Before the panel opinion in *Blessitt* was vacated, the IRS announced that it would not follow that decision, and the PBGC submitted amicus briefs in support of in banc rehearing in both *Blessitt* and *Tilley*.

15. It should be noted that ERISA § 4044 does not apply in cases of partial termination unless, as here, it is incorporated into

We therefore reject plaintiffs' argument based on § 4044 of ERISA, and conclude that the Plan fiduciaries' decision on this question must also be sustained.

IV.

We next address the claim that the § 4.3(b) benefit limits, interpreted by the plaintiffs as a cap on creditable earnings, should not apply in the case of partial plan termination. Once again the answer to the issue raised by the plaintiffs is dictated by the express provisions of the Plan. The plaintiffs affected by the resolution of this issue have 30 years of service but are not yet 62 years of age.[16] They claim immediate entitlement to the Thirty-Year Benefit provided in Plan § 4.3 but without the limitation imposed by § 4.3(b)(i) and (ii). Once again, plaintiffs can point to nothing that would justify deviation from the express requirements of the Plan. First, they suggest that because the partial termination came before they had had an opportunity to attain 62, the age requirement should be ignored. The fiduciaries are not authorized, however, to disregard the express provisions of the Plan because the employment relationship has had a shorter duration than the employee may have hoped for. The Plan cannot be construed to guarantee any employee a right to remain such for any length of time or the benefits that such a right to continued employment would entail. Article VII, § 7.2 states:

---

the plan. The plaintiffs argue that the Plan should have specified, when it incorporated § 4044, that the provision should be read narrowly, and that since the Plan failed to do so § 4044 and Plan § 12.1(b) must be read broadly. We disagree. The reading plaintiffs would give § 4044 is simply wrong, and § 12.1(b) cannot be considered to incorporate that reading.

16. Again, we do not address the question whether the benefits now received by these plaintiffs under § 4.3(b) should, upon their attainment of age 62, be calculated instead under § 4.3(a).

> The Plan shall not be deemed to constitute a contract between the Company and any Participant and any former Participant or to be a consideration for, or an inducement for, the employment of any Participant by the Company. Nothing contained in the Plan shall be deemed to give any Participant the right to be retained in the service of the Company or to interfere with the right of the Company to discharge any Participant at any time, without regard to the effect that such discharge shall have upon his rights, if any, under the Plan.

App. at 108.

Second, plaintiffs argue that § 4.3(b) applies only to participants who "shall retire" and, accordingly, cannot be said to apply to participants who were involuntarily terminated. Fortunately for the participants who have served 30 years, the Plan has consistently taken the position that any employee who is terminated at a time when he or she has met the requirements for receipt of a retirement benefit and who applies for that benefit in connection with the termination should be treated as having elected retirement.

Plaintiffs' argument ignores the fact that *all* of § 4.3 applies to participants who "shall retire" and if this phrase were construed to exclude anyone that has been terminated, plaintiffs could point to no provision of the Plan under which they would be entitled to an immediate pension in the amount they claim. The Early Retirement benefit of Plan § 4.4, for example, is less than the amount available under § 4.3(b)(i) or (ii), and the "vested deferred benefit" under Article V is payable only when a participant reaches 65 or in an actuarially reduced amount between ages 55 and 65. Thus, if the plaintiffs' argument were accepted, the

text of the Plan itself would require denial of the benefits claimed. It follows that plaintiffs have provided no rationale under which they can enjoy Thirty-Year Benefits and, at the same time, not be bound by the specific limitations thereon found in § 4.3(b).[17]

V.

Plan § 5.2 provides a benefit for any participant who is terminated prior to reaching his or her normal retirement date for any reason other than death or retirement at a Thirty-Year Retirement Date, an Early Retirement Date or a Disability Retirement Date, and who has accumulated certain specified service. As earlier noted, when an employee is being terminated who has qualified for some form of early retirement benefit and he or she elects to take that benefit in connection with the termination, he or she is regarded as having voluntarily retired for purposes of the Plan and receives the requested benefit. The benefit conferred by § 5.2, however, is for those Plan participants who have not yet qualified for any form of early retirement benefit.

There is no dispute that the plaintiffs who make a claim under § 5.2 are entitled to the benefit conferred by that section. The dispute concerns the amount of the benefit. Section 5.2 defines the amount of the benefit by reference to the employee's "annual

17. Another argument advanced by the plaintiffs is that the purpose of the benefit limit was to prevent highly-paid employees from taking favorable early retirement benefits from CIOC and then going to work for competing companies, and that because this purpose is no longer valid, the benefit limit itself should no longer be valid. While we agree that the purpose of a given benefit is helpful in resolving any ambiguity in the language used, we believe that considerations of purpose will not justify writing express limitations out of a plan and awarding a benefit in an amount clearly not contemplated when the plan was drawn.

retirement benefit . . . computed in accordance with the provisions of Section 4.1." The Plan contends that the "annual retirement benefit" is the amount prescribed by § 4.1(a), (b) and (c). Plaintiffs insist, however, that they are entitled as well to the 5% add-on provided by § 4.1(d) "[i]n the case of a Participant who retires on or after August 1, 1977 and before August 1, 1986." While the Plan acknowledges that § 4.1(d) is a part of § 4.1, it denies that the plaintiffs claiming under § 5.2 are "retiring" as that concept is utilized in § 4.1(d). The Committee explained its position to plaintiffs as follows:

> The Committee has consistently interpreted the term "retire" to mean a separation from the employment of the employer and all members of its controlled group under one of the circumstances described in Article IV which entitle the former employee to an *immediate* payment of a "Retirement Benefit". If the employee severs employment for any reason other than having "retired", as defined in Article IV, his rights and the benefits to which these rights apply will be determined under Article V (deferred vested) or Article VI (death).
>
> Based on their Credited Service and the ages of those claimants [claiming under § 5.2] whom you represent, none of them could have received an immediate benefit under the terms of Article IV at the time they severed employment. Therefore, it is the holding of the Committee that none of the claimants are deemed to have "retired", as that term is used in the Plan.
>
> * * *
>
> It is the Committee's opinion that the amount computed under 4.1(a) through 4.1(c) is the "Basic

> Pension Benefit" and that if a participant retires under one of these sections of Article IV between August 1, 1977 and August 1, 1986, the Basic Plan Benefit is increased by 5% pursuant to Section 4.1(d). The Committee believes this construction to be totally consistent with the wording of the Plan and its past interpretation that payment of a vested benefit under Article V is not due to retirement.

App. at 173, 191.

We agree with the district judge that the Committee's interpretation of the Plan is not arbitrary or capricious. The relevant inquiry given the assumption we have chosen to make about the applicability of *Bruch*, however, is whether application of principles of contract interpretation, with no deference being given to the Committee's interpretation, leads to the conclusion that § 5.2 claimaints are not entitled to the 5% add-on of § 4.1(d). The reference to "a Participant who retires" is ambiguous in the context of § 4.1(d). When we consider the clear purpose of that section, however, as we are required to do by the rules of contract construction, we conclude that the Committee's interpretation is the correct one. In context, it is apparent that § 4.1(d) provides a 5% add-on as an incentive for those participants who have the option to retire early to voluntarily elect to take that option. That purpose is not served by interpreting § 4.1(d) as applicable to a participant who is being involuntarily terminated and has no present right to early retirement benefits.

VI.

Finally, we consider plaintiffs' allegations that the conduct of the Plan fiduciaries violated ERISA so

gravely as to necessitate reversal of the decisions to deny plaintiffs the claimed benefits. On this issue, the district court said only that "[a]fter receiving the record, we find that this claim lacks merit." The plaintiffs complain that this district court holding is conclusory and without support, but their own allegations of ERISA violations are equally conclusory and equally without support.

To begin with, the plaintiffs take issue with fact that the Plan fiduciaries referred to Colt's counsel for advice rather than hiring independent counsel. As noted above, 29 U.S.C. § 1108(c)(3) specifically allows officers and others connected with the employer to serve as plan fiduciaries;[18] given that Congress clearly contemplated administration of ERISA plans by employers, we think that if it had intended to impose a requirement that plan administrators consult outside counsel in the course of their administration, it would have made this intention clear in the statute. Not only is such a requirement nowhere to be found in ERISA, but plaintiffs can cite no caselaw to support their view that the fiduciaries here should have engaged independent counsel to aid them in interpretation and administration of the Plan. The cases they do cite have to do with the conduct of fiduciaries in connection with the investment and management of plan assets, an area in which ERISA fiduciaries are uniformly held to stricter standards. *See, e.g., Hickerson v. Velsicol Chem. Corp.*, 778 F.2d 365, 371 (7th Cir. 1985);

---

18. In light of this statutory provision, we reject plaintiffs' suggestion that the fiduciaries here should not have been allowed to serve as both Colt managers and Plan administrators simply because of the potential conflict of interest between the two positions. Plaintiffs have not pointed to any more specific circumstances that might establish some reason why these particular fiduciaries should not be allowed to make decisions as envisaged by the Plan's own terms and in accordance with ERISA.

Donovan v. Bierwirth, 538 F. Supp. 463, 468-69 (E.D.N.Y. 1981), *aff'd* 680 F.2d 263 (2d Cir. 1981), *cert. denied* 459 U.S. 1069 (1982); *Leigh v. Engle*, 727 F.2d 113, 124-26 (7th Cir. 1984).

The plaintiffs further charge that the fiduciaries should at the time of partial termination have conducted a general review of benefits payable. It is not clear to us what the basis for requiring fiduciaries to conduct such a review might be, and again, the plaintiffs are not able to point to any specific legal provision which the Plan fiduciaries can be said to have violated. Each Plan participant was provided by Colt with a statement of benefits payable to him or her in accordance with the fiduciaries' existing interpretation of the Plan, and the fiduciaries have reviewed, and taken a position with respect to, all claims for additional benefits. We have similar difficulties with the plaintiffs' contention that the fiduciaries should have given the participants written notice of the decision to seek an IRS determination that the plan was partially terminated. The plaintiffs, yet again, can cite no law that would entitle them to such notice.

Finally, the plaintiffs contend that the fiduciaries did not respond to the participants' requests for information about Plan funding and administration. While such a charge is always troubling, the particular charge in this case is too general and nonspecific to permit evaluation. The plaintiffs do not give any details of requests made by them, of refusals on the part of the fiduciaries to respond, or of particular information sought. The record contains a number of lengthy letters exchanged between the Administrator and plaintiffs' counsel, and between the Retirement Committee and plaintiffs' counsel, in which the administration and proper interpretation of the Plan are discussed. During discovery, the plaintiffs'

interrogatories were answered and they obtained requested documents pertaining to Plan funding and administration; the plaintiffs do not assert that discovery was insufficient, and they themselves moved for summary judgment.

We note that even if more specific claims of improper plan administration could be made by the plaintiffs here, it is doubtful that those claims would require reversal of the district court's judgment in light of the general principle that an employer's or plan's failure to comply with ERISA's procedural requirements does not entitle a claimant to a substantive remedy. *See Wolfe v. J.C. Penney Co.*, 710 F.2d 388, 393 (7th Cir. 1983); *see also Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320, 328-29 (2d Cir. 1985). In some egregious circumstances, an exception may be made, *see Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353 (9th Cir. 1985) (where employer actively concealed its written severance plan from employees, set up no claims procedure whatsoever, and denied benefits in contravention of the plan's plain terms, procedural violations of ERISA so outrageous as to render void the denial of benefits), but this is not such a case. In light of the lack of substance of the plaintiffs' allegations on this score, we must agree with the district court that the situation does not warrant the invalidation of the fiduciaries' decisions.

VII.

For the foregoing reasons, the judgment of the district court will be affirmed.

MANSMANN, *Circuit Judge*, concurring and dissenting.

I concur with the majority as to the rights of most of the plaintiffs in this case; however, I would address the issue of the Thirty Year Retirement Benefit for those plaintiffs who, even though they had not reached the age of 62, had given thirty years past service to the company. Although the record and the briefs are not altogether clear on this point, responses to my questions during oral argument indicated that some plaintiffs who in fact had served for thirty years prior to the termination of their employment have been denied this benefit. This is not a situation where these plaintiffs have chosen to leave employment and have voluntarily forfeited expected benefits equivalent to a normal retirement benefit for those plaintiffs who, except for the company's decision to reduce the work force drastically and the resulting partial termination of the Plan, had every right to expect that once they had achieved the service requirement, they would not be denied unreduced benefits on the eve of reaching the age of 62.

In an abundance of caution, I would address this issue because my proposed resolution does not rely upon the reasoning advanced by the majority in support of its denial of the other benefits also at issue.

I view the fulfillment of the service requirement as the key element in triggering the award of the type of benefit at issue here. I am confident that Congress speaking through ERISA would deem this benefit "accrued" and that the Internal Revenue Code would mandate it "nonforfeitable." It would be error to permit the Plan, and ultimately the company-employer, to take full advantage of the Code's tax deferrals and also to confiscate these employee wages which justly and legally belong to the Thirty Year employees.

I.

These particular plaintiffs contend that Section 12.1(c) of the Plan makes the Thirty Year Retirement Benefit nonforfeitable in the context of a "partial termination." This section provides:

> (c) In the event of "termination" or "partial termination" of the Plan (as those terms are used in Section 411(d)(3) of the Internal Revenue Code, or any successor statutory provision) the rights of the Participants, Beneficiaries and Contingent Annuitants to benefits accrued to the date of such termination or partial termination, to the extent funded as of such date, shall be non-forfeitable.

The Plan section incorporates requirements for a plan qualifying for tax advantages under the Internal Revenue Code. The Code provides that upon termination or partial termination "the rights of all affected employees to benefits accrued to the date of such termination, partial termination, or discontinuance, to the extent funded as of such date, . . . are nonforfeitable." 26 U.S.C. § 411(d)(3) (1978 & Supp. 1988).

A partial termination causes the accrued benefits of all nonvested or partially vested participants who have benefits that have not been forfeited before the partial termination occurs to become nonforfeitable--to the extent funded--regardless of whether the participant is employed on the exact day of the partial termination. S. Bruce, *Pension Claims: Rights and Obligations* 536 (1988).

No one disputes that the Plan at issue here is fully funded. The central question these plaintiffs have raised on this appeal, therefore, is whether the Thirty Year Retirement Benefit is an "accrued benefit" within

the meaning of ERISA and the Code. If it is, the Plan will not qualify for tax deferrals unless the benefit is a nonforfeitable right which must be satisfied as to these plaintiffs.

I agree with the majority that *Bencivenga v. Western Pennsylvania Teamsters and Employers Pension Fund*, 763 F.2d 574 (3d Cir. 1985), represents the law of this circuit. However, since I view the facts of this case as differing substantially from those in *Bencivenga*, I conclude that *Bencivenga* is clearly distinguishable and thus does not control here.

In *Bencivenga* we decided that, in the context of an ongoing plan, altering the discount factor used in computing an early retirement benefit to achieve a *bona fide* actuarial equivalence to the normal retirement age benefit is not an impermissible reduction of accrued benefits under ERISA. *Id.* at 580.

These are what I perceive to be the relevant facts of *Bencivenga*. The plaintiff worked for 29 years and retired at the age of 52. He was eligible for an early retirement benefit at the age of 55. Shortly after the plaintiff retired, the fund trustees amended the plan, increasing the discount factor to insure that benefits paid prior to the normal retirement age would equal those payable at normal retirement.

We rested our holding on a decision that an early retirement benefit is not an accrued benefit under ERISA. We determined that the type of early retirement benefit at issue in *Bencivenga* would actually constitute a subsidized amount, which is not protected from reduction as an accrued benefit under 26 C.F.R. § 1.411(a)-7(a)(1)(ii). *Id.* In writing for the court, Chief Judge Aldisert stated: "It follows . . . that a plan that provides for a higher level of payments for early retirement when actuarially compared to normal retirement benefits, contains an actuarial subsidy for early retirees that is not protected as an 'accrued

benefit.' " *Id.* Because by the amendment the trustees of the plan had merely eliminated a subsidy, we concluded that no violation of ERISA had occurred.

The issues before us differ in several significant respects from those in *Bencivenga*. The present case does not involve the amendment of an *ongoing* plan to equalize benefits. Here the plaintiffs request benefits *equal* to, not greater than, normal retirement benefit. Thus no question of a "subsidy" arises in this case. Furthermore, these plaintiffs concede that, should they choose to receive the Thirty Year Retirement Benefit before reaching the age of 62, the amount will be actuarially adjusted just as a normal retirement benefit would be for a participant who chooses to take retirement before the age stated in the Plan. Since *Bencivenga* decided that a benefit entirely different from the Thirty Year Retirement Benefit was not an accrued benefit, it has no direct application here.

Moreover, in *Bencivenga*, the language of footnotes 3 & 5 supports my view that the Thirty Year Retirement Benefit should be considered an accrued benefit. In footnote 3, *id.* at 577 n.3, we noted that Congress has amended ERISA § 204(g), 29 U.S.C. § 1054(g), to include early retirement benefits within its accrued benefits protection for plan years beginning after December 31, 1984. Retirement Equity Act, § 301(a)(2), Pub. L. No. 98-397, 98 Stat. 1450-51 (1984).

In footnote 5, we stated that the REA "recognizes and builds upon the distinction between actuarially reduced early retirement benefits and those that are in excess of actuarial equivalence, or subsidized benefits, choosing to treat less favorably the right to a subsidized benefit." *Bencivenga*, 763 F.2d at 580 n.5.

We further stated: "The 1984 Act is thus premised on the theory that early retirement benefits may be 'accrued benefits,' and also on the view that *a benefit*

subsidy may be reduced in circumstances that would be impermissible for an early retirement benefit that is already actuarially equivalent to the normal retirement benefit at normal retirement age." *Id.* (Emphasis supplied). Thus, were the REA to apply retroactively to this case, *Bencivenga* itself requires the conclusion that, as an actuarially equivalent early retirement benefit, the Thirty Year Retirement Benefit would be considered an accrued benefit under ERISA.

Since the Plan was partially terminated on July 31, 1982, before the amendment to ERISA, the REA is not directly applicable. However, the legislative history of the 1984 Act indicates that, even when ERISA was enacted in 1974, Congress may have considered early retirement benefits akin to normal retirement benefits. The Senate Report states that the "bill clarifies the scope of the prohibition against [decreases of accrued benefits by amendment of a plan]. The committee intends that no inference is to be made on the basis of this clarification as to the scope of the prohibition *before the effective date of the provision.*" S. Rep. No. 575, 98th Cong., 2d Sess. 28, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2547 2574 (emphasis added). While the language is somewhat ambiguous, taken with the committee belief that accrued benefits are "essentially retirement benefits," *id.* at 2573, it suggests that Congress viewed the new provision as merely a codification of existing law that early retirement benefits fell within the definition of accrued benefits.

Because I view the facts in this case as sufficiently similar to those in *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402 (2d Cir. 1985), that case as well persuades me that the benefits at issue here constitute accrued benefits within the meaning of ERISA. In *Amato* the plaintiffs alleged that a plan amendment reducing early retirement benefits for which they were

or would have become eligible violated their rights under ERISA § 204(g) and IRC § 411(d)(6), prohibiting the reduction by amendment of an accrued benefit. One of the plan provisions at issue was substantially similar to that in this case: the "Class A" pension provided that a participant who had completed 20 years of service would be eligible at age 55 to receive full retirement benefits. The plan amendment deprived the plaintiffs of higher unreduced benefits, effectively forcing them to wait until age 65 for full benefits or to receive an actuarially reduced benefit if they retired before age 65.

The Court of Appeals undertook to define an "accrued benefit." It noted that ERISA § 3(23) provides:

> (23) The term "accrued benefit" means--
>
> (A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 1054(c)(3) of this title, *expressed in the form of an annual benefit commencing at normal retirement age*, or

29 U.S.C. § 1002(23) (1985 & Supp. 1988) (emphasis supplied).

The court in *Amato* then proceeded to construe the language "expressed in the form of an annual benefit commencing at normal retirement age."[1] The court determined that since the Class A retirement benefit was calculated by precisely the same formula as the normal retirement benefit.

---

1. In *Bencivenga*, Chief Judge Aldisert cited the same language for a general conclusion that ERISA did not assure the particular early retirement expectations at issue there. Bencivenga v. Western Pennsylvania Teamsters and Employers Pension Fund, 763 F.2d 574, 577 (3d Cir. 1985). However, the opinion did not attempt to give meaning to the "in the form of" language, which was inapplicable to the facts of that case.

> it is apparent that the "form of" language when read together with 29 U.S.C. § 1054(c)(3) and in light of the statute's legislative history, was designed to require that a plan assure a retiree of at least as much as an actuarially-reduced equivalent but not permit the employer to deprive him of any more that might be provided by the plan.

Amato, 773 F.2d at 1408.

Here the Thirty Year Retirement Benefit is determined by the same formula used to compute the normal age 65 retirement benefit. The formula set forth in § 4.1 *Normal Retirement* directs that years of service be multiplied by 1.1% of Final Average Compensation, to be further increased by 5% under subsection (d) of § 4.1. Moreover, the Thirty Year Retirement Benefit set forth in § 4.3 contrasts with the Early Retirement Benefit set forth in § 4.4, which is actuarially reduced by 0.5% for each month that retirement precedes age 65. In this case, as in *Amato*, to give the statutory language force and effect, the Thirty Year Retirement Benefit, *determined by precisely the same formula as the Normal Retirement Benefit*, must be considered an accrued benefit.

In further support of its conclusion that the benefits at issue in *Amato* were accrued benefits, the Court of Appeals for the Second Circuit looked to ERISA'S legislative history. The following statement in the House Report relates also to the question before this court:

> The term "accrued benefit" refers to pension or retirement benefits and is not intended to apply to certain ancillary benefits, . . . which are sometimes provided for employees in conjunction with a pension plan, and are sometimes provided separately. . . . [T]he accrued benefit to which the

> vesting rules apply is not to include such items as the value of the right to receive *benefits commencing at an age before normal retirement age*, or so-called social security supplements which are commonly paid in the case of early retirement but then cease when the retiree attains the age at which he becomes entitled to receive current social security benefits, or any value in a plan's joint and survivor annuity provisions to the extent that exceeds the value of what the participant would be entitled to receive under a single life annuity.

H.R. Rep. No. 807, 93d Cong., 2d Sess. 60, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4670, 4726 (emphasis supplied).

As the court in *Amato* noted, when taken out of context the phrase underlined above could be interpreted to mean *any* early retirement benefits; however, a careful reading of the entire passage indicates that Congress intended to distinguish ancillary or temporary benefits from those which function it is to provide essentially retirement benefits. *Amato*, 773 F.2d at 1409. *See also Hoover v. Cumberland, Maryland Area Teamsters Pension Fund*, 756 F.2d 977, 982 (3d Cir.) (stating that House Report contrasts benefits which serve a primary function of providing retirement income with specialized, ancillary benefits), *cert. denied*, 474 U.S. 845 (1985).[2]

The court in *Amato* concluded that the House Report did not support the conclusion of the district

---

2. The court in *Bencivenga* set out the same language, without analysis, merely stating that the "legislative history, therefore, supports the literal language of the Act." Bencivenga v. Western Pennsylvania Teamsters and Employers Pension Fund, 763 F.2d 574, 577 (3d Cir. 1985).

court that the emphasized language excluded unreduced early retirement benefits from the definition of accrued benefits. *Amato*, 773 F.2d at 1410. Here as well, the language does not support excluding the Thirty Year Retirement Benefit from ERISA's protection. In fact, the Thirty Year Retirement Benefit falls more naturally into a category of expressly protected pension or retirement benefits than within the specifically excluded one of temporary or ancillary benefits.[3]

In *Amato* the court noted that nearly all the plaintiffs had met the service requirement of the plan; however, because the accrued benefits issue was decided in the context of a plan amendment, the court did not reach the question of whether the plaintiffs must meet the age requirement.

Recently in *Blessit v. Retirement Plan for Employees of Dixie Engine Co.*, No. 86-8123, slip op. (11th Cir. July 8, 1988) (en banc), the Court of Appeals for the Eleventh Circuit, in denying the plaintiff retirement benefits following a plan termination, emphasized the service requirement. The court held that ERISA does not require the payment of retirement benefits based on future years of service not actually worked as of the date on which the defined benefit plan terminated. *Id.* at 3654.

The court in *Blessit* determined that the plaintiff could not rely on *Amato*, in which the plaintiff had received benefits "even though he had not reached the requisite age/service combination necessary to qualify

---

3. Because I view the Thirty Year Retirement Benefit and the normal retirement benefit as equivalent in respect to ERISA's protection, I conclude that the Thirty Year Retirement Benefit accrues ratably from year to year. Thus, defining the Thirty Year Retirement Benefit as an "accrued benefit" would not, as the majority suggests in footnote 10 at 19 Typescript, disqualify the Plan.

for the full preamendment early retirement benefit." *Id.* at 3647. The court distinguished Blessit's case from that in *Amato* by stating that "the benefit received [in Amato] was *not* calculated on the basis of years not worked. *Id.* (Emphasis in original.)

Although the Court of Appeals for the Eleventh Circuit interpreted the 1984 Amendments as mandating that the plaintiffs meet both age and service requirements, *id.* at 3648-49, it also addressed the policy concerns behind denying expected benefits to those who had given long years of service. The court stated:

> It is clear that the scope of legitimate benefit expectations addressed by ERISA extends only to those benefits that employees accrue through "significant years of service." [citation omitted] Congress believed that an employee had a legitimate expectation of receiving those retirement benefits earned through long years of employment.

Id. at 3649-50.

I would agree with the decision in *Blessit* to the extent that it rests on awarding retirement benefits to those who have met the service requirement. In addition I conclude that the congressional purpose behind the passage of ERISA supports the view that, in partial termination situations, meeting the service requirement triggers the grant of retirement benefits even though the age requirement remains unfulfilled.

II.

Although I would hold that the Thirty Year Retirement Benefit has accrued under the statute, even assuming that it has not, the purposes and policies behind ERISA justify awarding the Thirty Year

Retirement Benefit to the plaintiffs here who have achieved thirty years of service.

The legislative history of ERISA leaves no doubt that Congress considered pensions to be the deferred wages of employees. Senator Harrison Williams, one of the principal architects of ERISA, stated in the floor debate that "pensions are not gratuities, . . . They represent savings which the worker has earned in the form of deferred payment for his labors." 119 Cong. Rec. S29995, 30005 (daily ed. Sept. 18, 1973). Senator Jacob Javits stated: "The fact of the matter is that the private pension plan is a means for transferring earnings during the working years into income for a decent living in the older years. The worker 'works' for that pension the same way he 'works' for his wages or salary. . . ." *Id.* at 30007. Although commentators have conceded that courts as yet have not treated pension rights as deferred wages, Stein, *Raiders of the Corporate Pension Plan: The Reversion of Excess Plan Assets to the Employer*, 5 Am. J. Tax Pol'y 117, 151 (1986), Congress enacted ERISA to protect these deferred wages of employees. *Pension Asset Raids: Hearings before the House of Representatives Select Committee on Aging*, 98th Cong., 1st Sess. 8 (1983) [hereinafter *Hearings*] (comments of Hon. Edward R. Roybal, Chairman).

In 1974 Congress recognized that,

> Unless an employee's rights to his accrued pension benefits are nonforfeitable, he has no assurance that he will ultimately receive a pension. Thus, pension rights which have slowly been stockpiled over many years may suddenly be lost if the employee leaves or loses his job prior to retirement. Quite apart from the resulting hardships, . . such losses of pension rights are inequitable, *since the pension contributions*

> *previously made on behalf of the employee may have been made in lieu of additional compensation or some other benefits which he would have received.*

S. Rep. No. 383, 93d Cong., 2d Sess. 45, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 4930 (emphasis supplied).

When the plan sponsor terminates a pension plan, the accrued benefits of the participants become the vested liabilities of the plan, which must be satisfied. Thereafter, remaining "surplus" assets revert to the employer. *Hearings*, at 9. Because in 1974 when Congress passed ERISA, it mainly was concerned with underfunding, Congress did not consider the problem of reversions.

As an example of the enormity of the reversion problem, Congress determined that between January, 1980 and August, 1983, 114 plan terminations resulted in the recapture of $443 million by sponsors of pension plans. *Hearings*, at 9 (remarks of Hon. Edward R. Roybal, Chairman). From 1980 to 1986 over 1,220 plans with 1.4 million participants have been terminated with reversions to sponsoring employers totaling over $12 billion. S. Bruce, *Pension Claims: Rights and Obligations*, 608 (1988).

The reversion of plan assets to employers following plan termination "changes the rules of the game" for millions of employees who, like the employees in the present case, "do not have enough years of life remaining to join a new game." *Hearings*, at 80 (comments of Arthur Williams III).

Employers have argued, and courts have largely supported their position, that employers would not be unjustly enriched if permitted to retain surplus assets. Stein, *supra*, at 130. Employers contend that if excess assets are used to provide employees with promised

benefits, the employees will enjoy a windfall. *Id.* at 156. This assertion is simply inconsistent with the view that these benefit plans are designed as a precise, although deferred, equivalent of current wages. As between employers and employees, "these assets should be considered the property of the plan *beneficiaries* to be used for their exclusive benefit." *Hearings*, at 65 (statement of Thomas Woodruff, Ph.D., Former Executive Director for the President's Commission on Pension Policy) (emphasis supplied).

Far from providing a windfall to the employee, ERISA and the Internal Revenue Code provide a means for enriching the employer through tax savings. The plan sponsor receives a tax deduction when it contributes to the plan. The contribution, along with its investment return, is not taxed as ordinary income until it is paid, either as a benefit to the participant or as a reversion to the sponsor. This provision results in a tax-free investment return on the contribution after tax through the period of deferral. Stein, *supra*, at 167. While Congress intended this government subsidy to assist retirement saving, its purpose is perverted when the assets thus engendered inure to the plan sponsor rather than to a retiring plan participant. Indeed, one commentator has likened the tax advantage of ERISA to a "tax-free IRA" for the employer. S. Bruce, *supra*, at 609.

These considerations, coupled with the fact that employers are free in the context of a business decision to terminate employees on the eve of vesting, give weight to the view that benefits equivalent to normal retirement benefits, such as the ones at issue here, should accrue to those who have achieved the requisite years of service under the plan. The Thirty Year Retirement Benefit should therefore be awarded to these few plaintiffs, who regardless of their ages, have given thirty years of service to this employer.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3722

R. H. ASHENBAUGH, et al.,
Appellants,

vs.

CRUCIBLE INC. 1975 SALARIED RETIREMENT PLAN

SUR PETITION FOR REHEARING

BEFORE: GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and HUNTER,
Circuit Judges

The petition for rehearing filed by Appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

Dated: SEP 19 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

R. H. ASHENBAUGH, et al., Plaintiffs	)	
v.	)	
CRUCIBLE INC., 1975 SALARIED RETIREMENT PLAN, Defendant	)	Civil Action No. 86-1571

MEMORANDUM OPINION

This is an action to compel the payment of retirement benefits under the Employee Retirement Income Security Act (ERISA) 29 U.S.C. § 1001 et seq. Plaintiffs are former salaried employees of Crucible Inc. whose jobs were terminated when the Crucible plant located in Midland, Pennsylvania shut down its operations in July 1982. Defendant Crucible Inc. 1975 Salaried Retirement Plan ("the Plan") has moved for summary judgment, pursuant to Fed.R.Civ.P. 56, contending that plaintiffs have failed to prove as a matter of law that the Plan administrators have acted in an arbitrary and capricious manner in denying plaintiffs' application for retirement benefits. For the reasons which follow, we will grant the defense motion for summary judgment.

The facts of this case are not disputed. Both parties acknowledge that the Midland plant shutdown in July 1982 constituted a "partial termination" of the Plan. Partial termination, simply stated, occurs when some plan participants continue to work even though certain employer operations have ceased. It is also not disputed that the terminated employees have not met the age and

service requirements of the Plan. As set out in the complaint, the plaintiffs fall into three age and service categories:

(A) Employees who have obtained 30 years of service (Plan § 4.3(b)).

(B) Employees who have attained 30 years of service and retire at age 62 (Plan § 4.3(a)).

(C) Employees with "vested deferred" benefits (i.e. non forfeitable benefits payable at age 65), who retired after August 1, 1977 and before August 1, 1986. (Plan § 4.1(d)).

Plaintiffs concede that they have not met the age and service requirements of the Plan, but they argue that "the occurrence of a partial Plan termination requires the immediate vesting of all Plan benefits, whether previously invested, accrued or forfeitable, to the extent that the Plan's funds permit. . . ." They contend, in essence, that the occurrence of a partial Plan termination removes the age and service requirements of the Plan.

Plaintiffs, in accordance with the administrative review procedures set forth in the Plan, filed claims with the Plan Administrators. After the claims were denied, they appealed to the Plan's Retirement Committee. In February 1986, the Committee, in a comprehensive opinion, affirmed the rulings of the Plan Administrators. The task of this Court, then, is to determine whether the Plan Administrators have acted arbitrarily and capriciously in determining that plaintiffs were not entitled to retirement benefits. *Tanzillo v. Local Union 617, Intern. Bro. of Teamsters*, 769 F.2d 140, 147 (3d Cir. 1985). *Struble v. N.J. Brewery Emp. Welfare Trust Fund*, 732 F.2d 325 (3d Cir. 1984). The Court concludes that it did not.

Plaintiffs claim that § 12.1(a) of the Plan supports its contention that the partial termination of the Plan requires the immediate vesting of all Plan benefits. The relevant portions of § 12 provide:

> 12.1 (a) The Board of Directors may at any time terminate the Plan or completely discontinue contributions hereunder. The Company shall have no liability for any further contributions and Participants, Contingent Annuitants and Beneficiaries shall be entitled to rely solely upon the Trust Fund for the payment of any benefits hereunder, plus any amount which may, by operation of law, be required to be contributed for the purpose of benefit payment from any source.
>
> (b) In the event of termination or partial termination of the Plan, the assets of the trust under the Plan shall be allocated in accordance with the priorities established in Section 4044 of ERISA (or any successor statutory provision).
>
> (c) In the event of "termination" or "partial termination" of the Plan (as those terms are used in Section 411(d) (3) of the Internal Revenue Code, or any successor statutory provision) the rights of the Participants, Beneficiaries and Contingent Annuitants to benefits accrued to the date of such termination or partial termination, to the extent funded as of such date, shall be non-forfeitable.

Plaintiffs insist that both subsection (b) and (c) require payment by the Plan. However, as the Retirement Committee correctly pointed out, the two subsections refer to two different types of "partial termination." Subsection (c), referring to partial termination as defined by the Internal Revenue Code, 26 U.S.C. § 411(d) (3) is the applicable portion here. The plant operators requested the IRS to determine whether a partial termination had

occurred. The IRS ruled that the partial termination occurred on July 31, 1982. As a result, in accordance with subsection (c), the rights of the terminated employees to benefits accrued to the date of partial termination, to the extent funded as of such date, became nonforfeitable.

Plaintiffs argue that Subsection (b), calling for the allotment of retirement monies in accordance with ERISA section 4044, 29 U.S.C. § 1344(b) is applicable here. (*See Amato v. Western Union International, Inc.*, 773 F.2d 1402 (2d Cir. 1985)). But, as was pointed out by the Retirement Committee, Title IV of ERISA is not applicable when there is a partial termination as defined by the Internal Revenue Code. *See* 29 U.S.C. § 1343(b) (4). (a partial termination as defined under the Code "does not, by itself, constitute or require a termination of a plan under this subchapter.") Thus it is clear that Article IV of ERISA applies to *full* terminations, rather than partial terminations.[1] As the third Circuit stated in *United Steelworkers of*

---

[1] In support of their claims, Plaintiffs argue that under *Blessit v. Retirement Plan for Employees of Dixie Engine*, 817 F.2d 1528 (11th Cir. 1987), category six of ERISA § 4044 would cover the claimed benefits and thus eliminate the Plan's preconditions for those benefits. However, *Blessit* involved application of the asset allocation rules under § 4044 in a full plan termination whereas no full plan termination has occurred in the instant case and accordingly § 4044 has no application here and *Blessit* is not applicable or persuasive authority. In addition, we would take note that § 4044 does not in itself create any substantive right to benefits which rights, if any, must be determined by reference to the plan documents. The sole purpose of § 4044 is to marshal a plan's assets when those assets are insufficient to pay all of the benefits that the plan itself provides.

America v. Harris & Sons Steel Co., 706 F.2d 1289 (3d Cir. 1983), a partial termination under the Code definition will not trigger an allocation of assets under Article IV. Accordingly, the Committee did not act in an arbitrary and capricious manner in concluding that subsection (c) applied here.

The question now before the Court is whether subsection (c) allows plaintiffs to collect benefits even though the requisite age and service requirements have not been met. Plaintiffs insist that their "interests" in the 30-year retirement benefit of Plan § 4.3 are "accrued" benefits under Plan § 12.1(c). This contention contradicts the language of ERISA and the law of this Circuit. Section 3(23) (A) of ERISA, 29 U.S.C. § 1002(23) (A), defines an accrued benefit as a benefit "expressed in the form of an annual benefit commencing at normal retirement age." Plan § 1.1 sets 65 as the normal retirement age. The issue then becomes whether the 30-year benefit of Plan § 4.3, which would enable an employee to retire before age 65, the normal retirement age, is an accrued benefit which in turn would make the benefits nonforfeitable. This question was settled in *Hoover v. Cumberland, MD Area Teamsters Pension Fund*, 756 F.2d 977 (3d Cir. 1985). The court quoted from the legislative history of ERISA's benefit accrual provisions and noted that "the accrued benefit does not include the value of the right to receive early retirement benefits." *Hoover*, 756 F.2d at 982. (Citation omitted.) Thus, the right of an employee to early retirement benefits (i.e. before reaching age 65) due to 30 years of service, does not make that right an accrued benefit under the provisions of ERISA, and the partial termination does not make these benefits nonforfeitable.

The Court concludes that the Plan Administrators' interpretation of the Retirement Plan was not irrational. As a result, the Court holds that plaintiffs have not met their burden of showing that defendant acted in an arbitrary and capricious manner.[2]

An appropriate order will be filed.

---

[2] Plaintiffs argue that the procedures followed by the Plan were so violative of ERISA that the decisions of the Plan Administrators are arbitrary and capricious. After receiving the record, we find that this claim lacks merit.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

R. H. ASHENBAUGH, et al., Plaintiffs	)	
v.	)	Civil Action
CRUCIBLE INC., 1975 SALARIED RETIREMENT PLAN, Defendant	)	No. 86-1571

ORDER

AND NOW, this 25th day of September, 1987, for the reasons set forth in the accompanying Memorandum Opinion,

IT IS HEREBY ORDERED that:

(1) Plaintiffs' Motion for Partial Summary Judgment is DENIED:

(2) Defendant's Motion for Summary Judgment is GRANTED;

(3) Judgment is entered in favor of the Defendant, Crucible Inc., 1975 Salaried Retirement Plan, and against the Plaintiffs, R. H. Ashenbaugh, R. B. Andrews, R. L. Appeldorn, A. L. Austin, J. D. Balser, A. Barrasso, J. O. Bauer, H. W. Bigleman, C. R. Balzier, J. P. Bressaneili, G. Brown, E. Bucan, J. M. Burke, J. R. Butchko, E. C. Calvin, R. R. Campbell, P. D. Castellano, D. R. Cauley, J. L. Cerasi, E. Chapman, S. Christy, P. R. Ciancone, T. M. Costello, T. J. Curry, G. Dauka, A. J. Decosta, A. P. Dimarzio. O. E. Edwards, E. P. Erath, E. Fahnert, H. Farrington, J. S. Ferrence, R. D. Feydo, E. R. Finger, C. E. Fix, Jr., W.

Frank, N. E. Frederick, J. P. Frenn, R. Fronko, L. L. Gibbs, W. L. Gleason, L. E. Gordon, J. E. Grimm, P. E. Grubbs, E. R. Guerra, A. J. Gulutz, J. T. Haaf, J. D. Hamacher, Jr., P. J. Hannon, R. M. Hansen, M. I. Harpham, D. H. Heldman, G. W. Henglein, J. K. Hile, R. T. Hopper, H. M. Howell, J. B. Itzel, Jr., K. M. Janke, C. L. Jobe, Jr., K. H. Johns, R. O. Johnson, Jr., L. M. Johnston, E. T. Jones, R. Kao, D. P. Kerr, Jr., P. A. Heys, R. W. Knalley, E. E. Knapek, W. J. Kofalt, S. W. Kohler, T. Kominitsky, T. R. Krupa, J. R. Kundick, W. Lake, D. F. Laneve, T. Lehmann, R. H. Lewis, R. A. Lippert, W. R. Livingston, A. J. Lynn, D. B. McClain, J. L. McKain, E. L. Marsh, C. R. Martsolf, F. S. Matsukas, T. J. Mayton, M. Mitrovich, M. A. Molchan, A. N. Morrison, H. Mraunac, M. R. Muckian, C. W. Murray. III, C. J. Myers, L. V. Nagle, E. Ordich, W. H. Orr, A. J. Pasko, Jr., M. E. Pellegrino, G. C. Pescion, G. V. Peterson, R. F. Pisano, W. J. Popp, G. P. Porto, G. Postich, D. E. Powelll, R. W. Prentice, J. Presutti, W. C. Price, L. E. Raykovics, T. R. Reed, J. W. Reider, M. J. Rose, R. H. Rutter, K. E. Sanders, M. A. Sarver, P. K. Schake, J. W. Scholtz, W. T. Scott, J. G. Seman, A. H. Sheline, M. L. Sherry, F. R. Shuss, W. W. Simpson, A. E. Six, J. E. Smith, E. H. Spaziani, W. H. Stephens, C. D. Strosnider, J. F. Suffoletta, J. Susich, H. Taylor, F. S. Thornberry, Jr., J. R. Tice, D. A. Townley, R. Trbovich R. T. Turner, R. R. Vlah, D. W. Ware, G. T. Weekley, E. M. Werries, Jr., J. A. Whitehead, T. Williams, Jr., T. H. Wills, D. P. Wood, A. J. Yanni, L. H. Young, Jr., R. C. Young, H. F. Yute and W. I. Zazwirsky

/s/ Glenn E. Mencer
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

R. H. ASHENBAUGH, et al., Plaintiffs	)	
v.	)	Civil Action
CRUCIBLE INC. 1975 SALARIED RETIREMENT PLAN,	)	No. 86-1571
	)	(Filed Oct. 9, 1987)
Defendant	)	

ORDER

AND NOW, this 9th day of October, 1987, upon consideration of Defendant's Motion to Alter, Clarify and Amend Judgment and Order of this Court dated September 25, 1987, and upon realization that Footnote 3 on Page 6 of the Memorandum Opinion, accompanying said Order, was inadvertently omitted,

IT IS HEREBY ORDERED that:

(1) Defendant's Motion to Alter, Clarify and Amend Judgment and Order is GRANTED in PART and DENIED in PART;

(2) Page 6 of this Court's Memorandum Opinion, without Footnote No. 3, supporting the Order of September 25, 1987, is hereby replaced and hereby substituted therefore is a new Page 6, with Footnote No. 3 included, which new Page 6 is attached to this Order;

(3) this Court's Order of September 25, 1987, filed in the above-captioned case, shall stand, without any alteration, clarification or amendment.

cm: All parties of record cc

/s/ Glen E. Mencer
United States District Judge

The Court concludes that the Plan Administrators' interpretation of the Retirement Plan was not irrational. As a result, the Court holds that plaintiffs have not met their burden of showing that defendant acted in an arbitrary and capricious manner.[2]

An appropriate order will be filed.[3]

---

[2] Plaintiffs argue that the procedures followed by the Plan were so violative of ERISA that the decisions of the Plan Administrators are arbitrary capricious. After receiving the record, we find that this claim lacks merit.

[3] Accepting, as we must, the standard of review that we must defer to the Plan Administrators' determination so long as that interpretation of the Plan is neither arbitrary nor capricious, *Tanzillo v. Local Union 617, International Brotherhood of Teamsters*, 769 F.2d 140 (3d Cir. 1985), we find no basis to refuse defendant's Motion for Summary Judgment as to Counts 1 and 2 of the Complaint. Since Plan § 4.3(a) applies only to participants who have attained age 62 when they retire, the Plan Administrators' interpretation, that the only benefits available to such participants are those provided by Plan § 4.3(b) (1) and § 4.4, or if less than 55, the vested deferred benefits under Article V, is neither arbitrary nor capricious. Likewise, the interpretation as to Count 2, that the terms of the Plan set forth at § 4.1(d) provide a benefit available only to participants who actually retired during the applicable period, cannot be set aside under the standard of review applicable here.

APPLICABLE STATUTES

Internal Revenue Code §411 MINIMUM VESTING STANDARDS

(a) General Rule

"(7) ACCRUED BENEFIT. –

"(A) IN GENERAL. – For purposes of this section, the term 'accrued benefit' means –

"(i) in the case of a defined benefit plan, the employee's accrued benefit determined under the plan and, except as provided in subsection (c) (3), expressed in the form of an annual benefit commencing at normal retirement age, or

"(ii) in the case of a plan which is not a defined benefit plan, the balance of the employee's account. . . .

"(8) NORMAL RETIREMENT AGE. – For purposes of this section, the term 'normal retirement age' means the earlier of –

"(A) the time a plan participant attains normal retirement age under the plan, or

"(B) the later of –

"(i) the time a plan participant attains age 65, or

"(ii) the 10th anniversary of the time a plan participant commenced participation in the plan.

"(9) NORMAL RETIREMENT BENEFIT. – For purposes of this section, the term 'normal retirement benefit' means the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age. The normal retirement benefit shall be determined without regard to –

"(A) medical benefits, and

"(B) disability benefits not in excess of the qualified disability benefit. . . .

(c) Allocation Of Accrued Benefits Between Employer And Employee Contributions

"(3) ACTUARIAL ADJUSTMENT. – For purposes of this section, in the case of any defined benefit plan, if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, or if the accrued benefit derived from contributions made by an employee is to be determined with respect to a benefit other than an annual benefit in the form of a single life annuity (without ancillary benefits) commencing at normal retirement age, the employee's accrued benefit, or the accrued benefits derived from contributions made by an employee, as the case may be, shall be the actuarial equivalent of such benefit or amount determined under paragraph (1) or (2). . . .

(d) Special Rules

"(3) TERMINATION OR PARTIAL TERMINATION; DISCONTINUANCE OF CONTRIBUTIONS. – Notwithstanding the provisions of subsection (a), a trust shall not constitute a qualified trust under section 401 (a) unless the plan of which such trust is a part provides that –

"(A) upon its termination or partial termination, or

"(B) in the case of a plan to which section 412 does not apply, upon complete discontinuance of contributions under the plan,

the rights of all affected employees to benefits accrued to the date of such termination, partial termination, or discontinuance, to the extent funded as of such date, or the amounts credited to the employees' accounts, are nonforfeitable. This paragraph shall not apply to benefits or contributions which, under provisions of the plan adopted pursuant to regulations prescribed by the Secretary or his delegate to preclude the discrimination prohibited by section 401(a)(4), may not be used for designated

employees in the event of early termination of the plan. . . .

"(6) ACCRUED BENEFIT NOT TO BE DECREASED BY AMENDMENT. – A plan shall be treated as not satisfying the requirements of this section if the accrued benefit of a participant is decreased by an amendment of the plan, other than an amendment described in section 412(c)(8). . . .

Internal Revenue Code §401(a)(7)

(Added October 10, 1962)

(7) A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that, upon its termination or upon complete discontinuance of contributions under the plan, the rights of all employees to benefits accrued to the date of such termination or discontinuance, to the extent then funded, or the amounts credited to the employees' accounts are nonforfeitable. This paragraph shall not apply to benefits or contributions which, under provisions of the plan adopted pursuant to regulations prescribed by the Secretary or his delegate to preclude the discrimination prohibited by paragraph (4), may not be used for designated employees in the event of early termination of the plan.

APPLICABLE REGULATIONS

26 C.F.R. §1.401-2

§ 1.401-2 Impossibility of diversion under the trust instrument.

(a) *In general.* (1) Under section 401(a)(2) a trust is not qualified unless under the trust instrument it is impossible (in the taxable year and at any time thereafter before the satisfaction of all liabilities to employees or their beneficiaries covered by the trust) for any part of the trust corpus or income to be used

for, or diverted to, purposes other than for the exclusive benefit of such employees or their beneficiaries. This section does not apply to funds of the trust which are allocated to provide medical benefits described in section 401(h) as defined in paragraph (a) of § 1.401-14. For the rules prohibiting diversion of such funds and the requirement of reversion to the employer after satisfaction of all liabilities under the medical benefits account, see paragraph (c) (4) and (5) of § 1.401-14. For rules permitting reversion to the employer of amounts held in a section 415 suspense account, see § 1.401(a)-2(b).

(2) As used in section 401(a)(2), the phrase "if under the trust instrument it is impossible" means that the trust instrument must definitely and affirmatively make it impossible for the non-exempt diversion or use to occur, whether by operation or natural termination of the trust, by power of revocation or amendment, by the happening of a contingency, by collateral arrangement, or by any other means. Although it is not essential that the employer relinquish all power to modify or terminate the rights of certain employees covered by the trust, it must be impossible for the trust funds to be used or diverted for purposes other than for the exclusive benefit of his employees or their beneficiaries.

(3) As used in section 401(a)(2), the phrase "purposes other than for the exclusive benefit of his employees or their beneficiaries" includes all objects or aims not solely designed for the proper satisfaction of all liabilities to employees or their beneficiaries covered by the trust.

(b) *Meaning of "liabilities"*. (1) The intent and purpose in section 401(a)(2) of the phrase "prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust" is to permit the employer to reserve the right to recover at the termination of the trust, and only at such termination, any balance remaining in the trust

which is due to erroneous actuarial computations during the previous life of the trust. A balance due to an "erroneous actuarial computation" is the surplus arising because actual requirements differ from the expected requirements even though the latter were based upon previous actuarial valuations of liabilities or determinations of costs of providing pension benefits under the plan and were made by a person competent to make such determinations in accordance with reasonable assumptions as to mortality, interest, etc., and correct procedures relating to the method of funding. For example, a trust has accumulated assets of $1,000,000 at the time of liquidation, determined by acceptable actuarial procedures using reasonable assumptions as to interest, mortality, etc., as being necessary to provide the benefits in accordance with the provisions of the plan. Upon such liquidation it is found that $950,000 will satisfy all of the liabilities under the plan. The surplus of $50,000 arises, therefore, because of the difference between the amounts actuarially determined and the amounts actually required to satisfy the liabilities. This $50,000, therefore, is the amount which may be returned to the employer as the result of an erroneous actuarial computation. If, however, the surplus of $50,000 had been accumulated as a result of a change in the benefit provisions or in the eligibility requirements of the plan, the $50,000 could not revert to the employer because such surplus would not be the result of an erroneous actuarial computation.

(2) The term "liabilities" as used in section 401(a)(2) includes both fixed and contingent obligations to emplyees. For example, if 1,000 employees are covered by a trust forming part of a pension plan, 300 of whom have satisfied all the requirements for a monthly pension, while the remaining 700 employees have not yet completed the required period of service, contingent obligations to such 700 employees

have nevertheless arisen which constitute "liabilities" within the meaning of that term. It must be impossible for the employer (or other non employee) to recover any amounts other than such amounts as remain in the trust because of "erroneous actuarial computations" after the satisfaction of all fixed and contingent obligations. Furthermore, the trust instrument must contain a definite affirmative provision to this effect, irrespective of whether the obligations to employees have their source in the trust instrument itself, in the plan of which the trust forms a part, or in some collateral instrument or arrangement forming a part of such plan, and regardless of whether such obligations are, technically speaking, liabilities of the employer, of the trust, or of some other person forming a part of the plan or connected with it.

[T.D. 6500, 25 FR 11672, Nov. 26, 1960, as amended by T.D. 6722, 29 FR 5072, Apr. 14, 1964; T.D. 7748, 46 FR 1695, Jan. 7, 1981]

26 C.F.R. § 1.401-6

§ 1.401-6 Termination of a qualified plan.

(a) *General rules.* (1) In order for a pension, profit-sharing, or stock bonus trust to satisfy the requirements of section 401, the plan of which such trust forms a part must expressly provide that, upon the termination of the plan or upon the complete discontinuance of contributions under the plan, the rights of each employee to benefits accrued to the date of such termination or discontinuance, to the extent then funded, or the rights of each employee to the amounts credited to his account at such time, are nonforfeitable. As to what constitutes nonforfeitable rights of an employee, see paragraph (a)(2) of § 1.402(b)-1.

(2)(i) A qualified plan must also provide for the allocation of any previously unallocated funds to the employees covered by the plan upon the termination

of the plan or the complete discontinuance of contributions under the plan. Such provision may be incorporated in the plan at its inception or by an amendment made prior to the termination of the plan or the discontinuance of contributions thereunder.

(ii) Any provision for the allocation of unallocated funds is acceptable if it specifies the method to be used and does not conflict with the provisions of section 401(a)(4) and the regulations thereunder. The allocation of unallocated funds may be in cash or in the form of other benefits provided under the plan. However, the allocation of the funds contributed by the employer among the employees need not necessarily benefit all the employees covered by the plan. For example, an allocation may be satisfactory if priority is given to benefits for employees over the age of 50 at the time of the termination of the plan, or those who then have at least 10 years of service, if there is no possibility of discrimination in favor of employees who are officers, shareholders, employees whose principal duties consist in supervising the work of other employees, or highly compensated employees.

(iii) Subdivisions (i) and (ii) of this subparagraph do not require the allocation of amounts to the account of any employee if such amounts are not required to be used to satisfy the liabilities with respect to employees and their beneficiaries under the plan (see section 401(a)(2)).

(b) *Termination defined.* (1) Whether a plan is terminated is generally a question to be determined with regard to all the facts and circumstances in a particular case. For example, a plan is terminated when, in connection with the winding up of the employer's trade or business, the employer begins to discharge his employees. However, a plan is not terminated, for example, merely because an employer consolidates or replaces that plan with a comparable plan. Similarly, a plan is not terminated merely

because the employer sells or otherwise disposes of his trade or business if the acquiring employer continues the plan as a separate and distinct plan of its own, or consolidates or replaces that plan with a comparable plan. See paragraph (d)(4) of § 1.381(c)(11)-1 for the definition of comparable plan. In addition, the Commissioner may determine that other plans are comparable for purposes of this section.

(2) For purposes of this section, the term "termination" includes both a partial termination and a complete termination of a plan. Whether or not a partial termination of a qualified plan occurs when a group of employees who have been covered by the plan are subsequently excluded from such coverage either by reason of an amendment to the plan, or by reason of being discharged by the employer, will be determined on the basis of all the facts and circumstances. Similarly, whether or not a partial termination occurs when benefits or employer contributions are reduced, or the eligibility or vesting requirements under the plan are made less liberal, will be determined on the basis of all the facts and circumstances. However, if a partial termination of a qualified plan occurs, the provisions of section 401(a)(7) and this section apply only to the part of the plan that is terminated.

[T.D. 6675, 28 FR 10120, Sept. 17, 1963]

Supreme Court, U.S.
FILED
JAN 5
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-897

In the Supreme Court of the United States

October Term, 1988

R. H. ASHENBAUGH, et al.,
Petitioners,

v.

CRUCIBLE INC 1975 SALARIED RETIREMENT PLAN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETER D. POST
(Counsel of Record)
WILLIAM H. POWDERLY III
DANIEL E. WILLE
REED SMITH SHAW & McCLAY
435 Sixth Avenue
Pittsburgh, Pennsylvania 15219
(412) 288-3131

Counsel for Respondent,
CRUCIBLE INC 1975 SALARIED RETIREMENT PLAN

PARTIES TO THE PROCEEDINGS

The sole defendant-respondent in the present case is the Crucible Inc 1975 Salaried Retirement Plan ("Plan"). The sponsor of the Plan was Crucible Inc, a wholly-owned subsidiary of Colt Industries Operating Corp which, in turn, was a wholly-owned subsidiary of Colt Industries Inc. As a result of corporate reorganization, Colt Industries Inc has succeeded to sponsorship of the Plan. The Plan is ultimately administered by the Retirement Committee, which is designated by the Plan-sponsor and, under the Plan's provisions, has the power and duty to interpret the terms of the Plan.

TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDINGS i

TABLE OF CONTENTS ii

TABLE OF CITATIONS iv

COUNTERSTATEMENT OF THE CASE 1

SUMMARY OF THE REASONS FOR DENYING THE WRIT 8

REASONS FOR DENYING THE WRIT 11

I. THE THIRD CIRCUIT HAS NOT RENDERED A DECISION IN CONFLICT WITH THAT OF ANY OTHER CIRCUIT ON THE QUESTIONS PRESENTED IN THE PETITION 11

A. There Can Be No Conflict With Any Other Circuit Because The Third Circuit Expressly Assumed That The Thirty Year Benefit Was An Accrued Benefit For Purposes Of The Appeal 11

B. Petitioners Have Not Identified Any Conflict Between The Third Circuit And Any Other Circuit Court With Respect To The Interpretation Of Section 411(d)(3) Of The Code And Section 4044 Of ERISA 13

1. The Third Circuit decision can not conflict with any other court on the question whether the Thirty Year Benefit is a benefit accrued for purposes of Section 411(d)(3) of the Code 13

Page

2. Because the Third Circuit's discussion of ERISA § 4044 was dicta, its decision cannot be in conflict with that of any court. 17

II. THE THIRD CIRCUIT DECISION IS SOUND AND IN ACCORDANCE WITH LAW 20

A. The Third Circuit Was Correct In Holding That The Thirty Year Benefit, Even If Assumed To Be An Accrued Benefit, Was Not Required By Law Or The Terms Of The Plan To Accrue Ratably Over The Working Life Of The Participants 20

B. The Third Circuit Correctly Held That Section 411(d)(3) Of The Code Is A Vesting Provision Only And Does Not Alter The Nature Of A Benefit Or Such Benefit's Preconditions Contained In The Plan 24

C. The Third Circuit Correctly Found That The Petitioners Were Not Entitled Under The Terms Of The Plan To The Window Benefit Or Benefits Calculated Without Regard To The Provisions Of Plan § 4.3(b) . . 27

CONCLUSION 28

CERTIFICATE OF MEMBERSHIP 29

TABLE OF AUTHORITIES

CASES

Page

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) 23, 25

Amato v. Western Union Int'l Inc., 773 F.2d 1402 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986) ..... passim

Blessitt v. Retirement Plan for Employees of Dixie Engine Co., 848 F.2d 1164 (11th Cir. 1988) (en banc), *vacating*, 817 F.2d 1528 (11th Cir. 1987) ..... passim

Chait v. Bernstein, 835 F.2d 1017 (3d Cir. 1987) 16

Nachman Corp. v. PBGC, 446 U.S. 359, *reh'g denied*, 448 U.S. 908 (1980) 25

Shaw v. Int'l Ass'n of Machinists and Aerospace Workers Pension Plan, 750 F.2d 1458 (9th Cir. 1985), *cert. denied*, 471 U.S. 1137 (1985) 9, 15

Tilley v. Mead Corp., 815 F.2d 989 (4th Cir. 1987), *cert. granted*, 109 S. Ct. 52 (1988) 9, 17, 19

United Steelworkers of America v. Harris & Sons Steel Co., 706 F.2d 1289 (3d Cir. 1983) 17

STATUTES

Code

26 U.S.C. § 401(a) 1
26 U.S.C. § 411(a)(4) 20
26 U.S.C. § 411(a)(7) 16
26 U.S.C. § 411(b)(1) 21
26 U.S.C. § 411(d)(3) ..... passim

Page

26 U.S.C. § 411(d)(6) ..... passim

ERISA

§ 3(2) 1
§ 204(a) 21
§ 204(g) 9, 14
§ 502(a)(1)(B) 7
§ 4001(8) 24
§ 4044 ..... passim
§ 4062 5
29 U.S.C. § 1002(2) 1
29 U.S.C. § 1002(19) 24, 25
29 U.S.C. § 1054(g) 9
29 U.S.C. § 1132(a)(1)(B) 7
29 U.S.C. § 1301 5
29 U.S.C. § 1301(8) 24
29 U.S.C. § 1344 6
29 U.S.C. § 1362(f) 5

OTHER

Retirement Equity Act, § 301(a)(2), Pub.L. No. 98-397, 98 Stat. 1450-51 (1984) 9, 26

OTHER AUTHORITIES

Legislative History of the Employee Retirement Income Security Act of 1974, Vol. III 21, 23
1974 U.S. Code Cong. & Admin. News 4726 22
1984 U.S. Code Cong. & Admin. News 2547 26
Rev. Rul. 83-52, 1983-1 C.B. 87 25
Rev. Rul. 85-6, 1985-1 C.B. 133 25

No. 88-897

In the Supreme Court of the United States

October Term, 1988

R. H. ASHENBAUGH, et al.,

Petitioners,

v.

CRUCIBLE INC 1975 SALARIED RETIREMENT PLAN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondent, Crucible Inc 1975 Salaried Retirement Plan, requests that the Petition for Writ of Certiorari be denied:

COUNTERSTATEMENT OF THE CASE

The Crucible Inc 1975 Salaried Retirement Plan ("Plan"), a defined benefit, single employer, pension plan as defined in Section 3(2) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(2), being qualified as defined in Section 401(a) of the Internal Revenue Code ("Code"), 26 U.S.C. § 401(a),

incorporates herein the facts as set forth in the opinion of the United States Court of Appeals for the Third Circuit ("Third Circuit"), except for the Third Circuit's ambiguous reference to a partial termination for purposes of ERISA.[1] For purposes of convenience some of the more pertinent facts are summarized in this section.

The Plan in which the Petitioners (hereinafter "Ashenbaugh" or "Petitioners") participate provides for a Normal Retirement Benefit payable upon retirement on a Normal Retirement Date, which is defined by the Plan as occurring no earlier than the first day of the month following the attainment of age 65.[2] An Early Retirement Benefit is payable upon retirement on an Early Retirement Date, which is defined by the Plan as occurring no earlier than the first day of the month following the attainment of age 55.[3] The amount of the Early Retirement Benefit is the Normal Retirement Benefit arithmetically reduced 5% for each year the Early Retirement Date is prior to the participant's Normal Retirement Date. This reduction has been

---

[1]See discussion at footnote 10.

[2]Section 1.1 of the Plan provides in relevant part:

Normal Retirement Date: The first day of the calendar month following the Participant's attainment of age sixty-five (65).

[3]Section 1.1 of the Plan states in relevant part:

Early Retirement Date: (a) With respect to a Salaried Employee who was a Participant on November 30, 1972: the first day of the calendar month next following any date prior to his Normal Retirement Date, on or after his attainment of age fifty-five (55) and his completion of five (5) years of Credited Service, on which he shall retire.

(b) With respect to a Salaried Employee who became a Participant on or after December 1, 1972: the first day of the calendar month next following any date prior to his Normal Retirement Date, on or after his attainment of age fifty-five (55) and his completion of fifteen (15) years of Credited Service, on which he shall retire.

assumed, and so accepted by the Internal Revenue Service, to have the result of the payment of the actuarial equivalent of the Normal Retirement Benefit commencing at the Early Retirement Date.

After 10 years of service, the Plan provides that a participant obtains a nonforfeitable right to a benefit equal in amount to the Normal Retirement Benefit accrued to the date of termination of active participation in the Plan.[4] Participants with such nonforfeitable rights are known as "Deferred Vested Participants." They may receive payment of the amount of their "Deferred Vested Benefit" at age 65, or, if they have at least fifteen years of service, as early as age 55 (arithmetically reduced by 5% a year).

The Plan also provides for a benefit payable to participants who retire on a Thirty Year Retirement Date.[5] If a participant with the required 30 years of Credited Service chooses or is deemed to retire before attaining age 62, a special benefit formula applies which establishes a maximum benefit; whereas, if a participant with the required Credited Service chooses or is deemed to retire after attaining age 62, the same benefit formula applies without the maximum.

The Thirty Year Benefit may be characterized as a "light switch" benefit in the sense that the benefit is "off" until the participant's retirement occurs on a Thirty Year Retirement Date, at which point the benefit turns "on."

---

[4]This Plan provision does not apply where the termination of the participant is due to death or events that are defined as retirement.

[5]Section 1.1 of the Plan provides in relevant part:

> *Thirty Year Retirement Date:* The first day of the calendar month next following any date prior to a Participant's Normal Retirement Date, on or after his completion of thirty (30) years of Credited Service, on which he shall retire.

The Thirty Year Benefit is a subsidized early retirement benefit.[6]

Finally, the Plan contained a "window benefit" provision which increased retirement benefits by 5% for participants who retired on or after August 1, 1977 but before August 1, 1986.

Salaried employees at several of the employer's facilities were participants in the Plan. The Midland, Pennsylvania, facility at which the Petitioners were employed was closed due to adverse economic conditions during mid-1982 and virtually all of the employees have been terminated.

Those participants who qualified for a Normal Retirement Benefit, an Early Retirement Benefit, a Thirty Year Benefit, or the "window benefit" received the appropriate retirement benefit. "Deferred Vested Participants", who did not qualify for any of these benefits, were given notice of their nonforfeitable rights to a Deferred Vested Benefit.

Crucible's corporate parent, Colt Industries Inc, sought and obtained a determination letter from the Internal Revenue Service ("IRS") that the Plan, which covered participants at the Midland plant as well as those at other locations, would be deemed to have partially terminated for IRS purposes, under Code § 411(d)(3), 26 U.S.C. § 411(d)(3), on July 31, 1982 as to those participants who were employed at the Midland plant. The partial termination for IRS purposes had no affect on the participants at other locations or the terms of the Plan, except the 10 year vesting provision of the Normal Retirement Benefit.

---

[6]Contrary to Ashenbaugh, The Third Circuit never discussed and never held that the Thirty Year Benefit was an "ancillary" benefit. (A.27).

Normally, if a participant employed at the Midland plant were terminated prior to having 10 years of service under the Plan, he would have no right to a benefit. However, since a partial termination of the Plan was determined by the IRS to have occurred effective July 31, 1982, pursuant to Code § 411(d)(3), this service requirement to acquire a right to a "Deferred Vested Benefit" became inoperative with respect to the group of affected terminated participants. Thus, Midland participants, regardless of their length of service, who were terminated after July 31, 1982, were informed by the Plan that they had obtained a nonforfeitable right to a "Deferred Vested Benefit."

The Plan continues in existence today and covers employee-participants employed at other locations by Colt Industries Inc. It has never been completely terminated in the sense of Title IV of ERISA, 29 U.S.C. § 1301, et seq., and no recapture of any remaining surplus assets has been sought.

Neither was the Plan partially terminated by the Pension Benefit Guaranty Corporation ("PBGC") pursuant to ERISA § 4062(f), 29 U.S.C. § 1362(f). Under that section, the assets and liabilities of a plan covering participants in multiple facilities, such as the instant Plan, can be required to be partitioned between terminated and active employees, and the portion of the plan applicable to the closed facility is deemed to have fully terminated for purposes of Title IV. Although notified by the Plan-sponsor of the decline in participation due to the closing of the Midland plant, PBGC did not elect to exercise its right to cause a partial termination of the Plan to occur for purposes of Title IV of ERISA.

The instant dispute involved three claims before the Third Circuit. (We will ignore for the present Ashenbaugh's new claims raised for the first time in the Petition for Writ of Certiorari). One group of Petitioners, who had at least thirty years of Credited Service at the time of termination but had not yet attained age 62 when they retired, claim that their Thirty Year Benefits should have been calculated in accordance with the formula applicable to participants retiring after attaining age 62.

The second group of Petitioners, who did not have thirty years of Credited Service when they terminated employment, claim that they are entitled to Thirty Year Benefits based on the years of employment served to the date of their termination payable unreduced when they would have completed thirty years of service if they had remained employed. These Petitioners also claim to be entitled to have these Thirty Year Benefits paid before the date they would have completed thirty years of Credited Service but reduced by 5% a year from the date when they would have had the thirty years. The Thirty Year Benefits the Petitioners seek are in part claimed to be mandated by Section 4044 of ERISA, 29 U.S.C. § 1344, which, under other facts and if applied literally as urged, would require assets to be allocated to these benefits.

A third group of participants who are eligible for "Deferred Vested Benefits" claim that they are entitled to the Plan's 5% "window benefit" although they did not retire during the window period.

The Plan's Retirement Committee ("Committee"), to whom benefit claims must be referred under the Plan's dispute resolution procedure, Plan § 10.11, denied the Petitioners' claims. In the Committee's judgment, the Petitioners were not entitled under the terms and conditions of the

Plan to the benefits they sought. Further, it was determined that the partial termination of the Plan declared by the IRS pursuant to Code § 411(d)(3) did not change the nature of the Plan's eligibility requirements for the Thirty Year Benefit or the "window benefit".

Finally, the Committee explained that ERISA § 4044 was inapposite to the Petitioners' benefit claims as a complete or partial termination of the Plan had not occurred as defined in Title IV of ERISA. The Committee opined that any attempt to dedicate assets to one group of participants in a case of partial termination for IRS purposes only could result in an unjustified preference to the Petitioners over those who participate in the continuing Plan, should such Plan subsequently terminate for ERISA purposes. Thus, the Committee determined neither ERISA § 4044 nor Plan § 12.1(b) had become operative.[7]

The Petitioners filed suit against the Plan in the United States District Court for the Western District of Pennsylvania pursuant to ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), seeking the claimed benefits. Cross-motions for summary judgment were filed. The District Court granted the Plan's motion for summary judgment, holding that the Petitioners were not entitled to the benefits they claimed because (i) they had not met the eligibility requirements contained in the terms and conditions of the Plan, (ii) Code § 411(d)(3) did not act to change the terms and conditions for the benefits at issue, and (iii) under the Plan, ERISA § 4044 was not applicable to the Petitioners'

---

[7]Plan § 12.1(b) states that "[i]n the event of termination or partial termination of the Plan, the assets of the trust under the Plan shall be allocated in accordance with the priorities established in Section 4044 of ERISA."

claims because the Plan was fully funded and had not been terminated for ERISA Title IV purposes.

A three-judge panel of the United States Court of Appeals for the Third Circuit, giving no deference to the decisions of the Retirement Committee, affirmed the District Court judgment, with Judge Mansmann concurring and dissenting. Circuit Judge Stapleton, writing for the Third Circuit, considered and rejected all of the employees' claims in a thorough and carefully reasoned opinion.

SUMMARY OF THE REASONS FOR DENYING THE WRIT

This case is unworthy of review by this Court. The main issue discussed in the Petition seems to deal with the meaning of "benefit accrued" for purposes of Code § 411(d)(3). As the Third Circuit explained, however, it makes no difference to the outcome of the dispute; it explained that assuming, *arguendo*, the Thirty Year Benefit to be an accrued benefit does not change the Plan-sponsor's right to establish an accrual method and benefit eligibility requirements it sees fit for this non-normal retirement benefit. Even if an "accrued benefit", meaning a protected benefit for Code § 411(a)(6) and ERISA § 204(g), the Thirty Year Benefit had not accrued to any extent for any of the Petitioners as of the date of the partial termination of the Plan for purposes of Code § 411(d)(3). The Third Circuit also correctly held that the eligibility requirements had to be met by the participants notwithstanding a partial termination under Code § 411(d)(3), but that Petitioners had failed to do so.

The Third Circuit's interpretation of Code § 411(d)(3) as affecting the vesting of benefits, but not benefit accruals, is supported by recent amendments to the Code and

ERISA; for example, ERISA § 204(g), 29 U.S.C. § 1054(g), as amended by the Retirement Equity Act ("REA"), § 301(a)(2), Pub. L. No. 98-397, 98 Stat. 1450-51 (1984). The decision is consistent with the interpretations of the Code by the IRS and of ERISA by the PBGC. The PBGC, in fact, filed an Amicus Curiae Brief in support of the Plan in the present case.

The Third Circuit's decision is not in conflict with any decision of any other court, and certainly not with *Amato v. Western Union Int'l Inc.*, 773 F.2d 1402 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986); *Tilley v. Mead Corp.*, 815 F.2d 989 (4th Cir. 1987), *cert. granted*, 109 S. Ct. 52 (1988); *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164 (11th Cir. 1988) (*en banc*), *vacating*, 817 F.2d 1528 (11th Cir. 1987); or *Shaw v. Int'l Ass'n of Machinists and Aerospace Workers Pension Plan*, 750 F.2d 1458 (9th Cir. 1985), *cert. denied*, 471 U.S. 1137 (1985).

The Third Circuit only discussed *Amato* and *Tilley* in connection with its own alternative grounds for affirming the District Court's grant of summary judgment in favor of the Plan. Thus, the Third Circuit case law discussion Ashenbaugh cites in his Petition is mere dicta within the opinion, and the questions posed, based on that dicta, of no general import or application. Of even greater moment is the fact that the part of the *Amato* decision that Ashenbaugh cites as authority was dicta in the Second Circuit's opinion as well. Moreover, *Tilley*[8] and *Blessitt*

[8]The court in *Tilley* did not address the issue of what constitutes an accrued benefit or a benefit accrued, but held only that ERISA § 4044(a)(6) required that future unearned benefits must be provided before a reversion of assets under ERISA § 4044(d)(1). Thus, no conflict with the Third Circuit is possible.

both involved actual reversions of Plan assets upon complete plan terminations and the consequent required application of Title IV of ERISA—unlike the present case. Therefore, the actual holding by the Third Circuit in this case is not in conflict with the actual holdings of these other appellate courts and intervention by this Court is not required.

None of the four questions set forth in the Petition justify the granting of certiorari by this Court. Ashenbaugh's first question, seeking a determination that the Thirty Year Benefit is an accrued benefit, is moot on the basis of the assumption made by the Third Circuit in Ashenbaugh's favor. Ashenbaugh's second question is not properly before this Court because the claims for benefits it contains were not raised in the District Court and expressly not addressed by the Third Circuit. (A.12, n.7).

Finally, the third and fourth questions do not raise important issues of federal law because ERISA § 4044 by its terms only applies to complete terminations of plans as defined in Title IV of ERISA, not partial terminations as defined in Code § 411(d)(3). Further, ERISA § 4044 is not at issue by virtue of the reference to it in Plan § 12.1(b). The Third Circuit sustained the Retirement Committee's determination, corroborated by the action of the PBGC, that a termination for purposes of Plan § 12.1(b) did not occur. (A. 29, n.15; 30). Ashenbaugh has not sought review of this determination by this Court. Thus, ERISA § 4044 is implicated in this case only by virtue of certain language peculiar to this particular pension plan and only if the Committee's unappealed determination were first overturned.

For these reasons, the Court should deny the writ.

REASONS FOR DENYING THE WRIT

I. THE THIRD CIRCUIT HAS NOT RENDERED A DECISION IN CONFLICT WITH THAT OF ANY OTHER CIRCUIT ON THE QUESTIONS PRESENTED IN THE PETITION.

A. There Can Be No Conflict With Any Other Circuit Because The Third Circuit Expressly Assumed That The Thirty Year Benefit Was An Accrued Benefit For Purposes Of The Appeal.

Much of the Petition is devoted to a complicated discussion about the meaning of "benefit accrued" for purposes of Code § 411(d)(3). The discussion misrepresents the Third Circuit opinion and is misleading as it suggests that it would make a difference in the outcome of the dispute if the Thirty Year Benefit were determined to be an accrued benefit.

Moreover, Ashenbaugh suggests that, by not holding that the Thirty Year Benefit was an accrued benefit, the Third Circuit opinion conflicts with that of the Second Circuit in *Amato*. As is apparent from Judge Stapleton's opinion, however, the Third Circuit expressly assumed for purposes of Ashenbaugh's appeal that the Thirty Year Benefit was an accrued benefit or a benefit subject to accrual for purposes of Code § 411(d)(3). Still it held that Petitioners were not entitled to any of the benefits they sought, since they had not satisfied the Plan terms and conditions for them. The Third Circuit stated:

> As we will discuss hereafter, the parties here disagree on whether the Thirty-Year Benefit falls within the statutory definition of an "accrued benefit." *We will assume for the moment that it does come within that definition and that it is thus to be treated in the same*

> *manner as the normal retirement benefit.* As we have seen, an employee's accrued benefit at any particular point in time is what a fully vested employee would be entitled to receive under the terms of the plan if employment ceased at that particular point in time. Here, the Plan provides that an employee is entitled to receive Thirty-Year Retirement Benefits only when he or she retires on a "Thirty-Year Retirement Date", i.e., only after having given 30 years of service. Thus, even if the Thirty-Year Benefit is to be treated as an accrued benefit, it does not "accrue" for any employee until he or she has given 30 years of service.

(A. 18) (emphasis added).

> We therefore believe the issue posed by plaintiffs—i.e., whether Plan § 12.1(c) or Code § 411(d)(3) require the payment to them of Thirty-Year Benefits—can be resolved without determining whether early retirement benefits of the sort in dispute here can ever be properly classified as an "accrued benefit." . . .

(A. 21).

> [E]ven if the Thirty-Year Benefit were considered an accrued benefit, Plan § 12.1(c) would not have the effect of superseding the age and service requirements of the Plan. It follows that the Plan fiduciaries' denial of Thirty-Year Benefits must be sustained.

(A. 27).

The Third Circuit expressly assumed for purposes of Ashenbaugh's appeal that the Thirty Year Benefit was an accrued benefit. This assumption, in and of itself, cannot have any precedential value. For this reason, the Third Circuit decision cannot be construed as being in conflict with *Amato*, with Petitioners' interpretation of *Amato*, or with any other decision.

Petitioners' first question, therefore, does not warrant review by this Court. Even if this Court were to agree with Petitioners' position that the Thirty Year Benefit was an accrued benefit, such a holding would not ordain any modification or reversal of the holding of the Third Circuit.

B. Petitioners Have Not Identified Any Conflict Between The Third Circuit And Any Other Circuit Court With Respect To The Interpretation of Section 411(d)(3) Of The Code And Section 4044 Of ERISA.

None of the decisions cited by Petitioners demonstrate either confusion or conflict between the Third Circuit and any other circuit concerning any question posed in the Petition.

1. The Third Circuit decision can not conflict with any other court on the question whether the Thirty Year Benefit is a benefit accrued for purposes of Section 411(d)(3) of the Code.

The first portion of the The Third Circuit opinion, which concerns Code § 411(d)(3), at first appears to contain three holdings:

1. Assuming that the Thirty Year Benefit is an accrued benefit, Ashenbaugh has not satisfied the conditions contained in the Plan in order to have a right to it, (A. 18);

2. Assuming that the Thirty Year Benefit is a protected accrued benefit, neither the Plan nor the law required the Thirty Year Benefit to be subject to accrual ratably over the working life of the participants, (A. 27); and

3. The Thirty Year Benefit is not an accrued benefit under the law or the terms of the Plan, (A. 21).

Only the first holding was necessary to the Third Circuit's decision, (A. 4); indeed, the Court of Appeals indicated in its opinion that it did not have to decide whether the Thirty Year Benefit was an accrued benefit in order to resolve the dispute between the parties. (Part IA, above). The Third Circuit held simply that, given its working assumption and the terms of the Plan, the Petitioners had not satisfied the preconditions provided in the terms of the benefit that would cause the Thirty Year Benefit to become payable, even if it were deemed an accrued benefit.

For the purpose of discerning a conflict among the circuits as to the nature of an accrued benefit, the initial holding of the Third Circuit makes the remainder of this portion of its opinion—the discussion of *Amato* and other cases, the definition of an "accrued benefit" and the meaning of Code § 411(d)(6)—all obiter dictum. Therefore, there can be no conflict between the Third Circuit's dicta and *Amato*.

Moreover, none of the cases cited by Ashenbaugh, not even *Amato*, involve or interpret Code § 411(d)(3)—except in dicta. Rather, they involve complete terminations under ERISA § 4044 or plan amendments under Code § 411(d)(6). (Of course, the instant case involves Code § 411(d)(3) alone.)

The critical issue in *Amato* involved a plan amendment which would eliminate certain early retirement benefits. This amendment would have affected even those who had fulfilled all the conditions inherent in the benefit but had not yet retired. The question was, whether under ERISA § 204(g) and Code § 411(d)(6) this amendment constituted a decrease in the plaintiffs' "accrued benefits." The Second Circuit held that the amendment resulted in a

prohibited reduction in the plaintiffs' accrued benefits and remanded the case to the district court:

> Thus our review of the pertinent statutes and regulations in light of Congress' expressed intent and Treasury regulations and interpretations satisfies us that the Western Union Amendment eliminating plaintiffs' unreduced early retirement benefits appears to violate ERISA § 204(g) and I.R.C § 411(d)(6), which prohibit a decrease in a participant's "accrued benefit".

Amato, 773 F.2d at 1414.

The *Amato* plaintiffs sought a declaratory judgment that the amendment was null and void; the Second Circuit's remand would direct such a declaration. With the amendment stricken, the plan would return to its pre-amendment status and the question concerning the alternative argument addressed by the Second Circuit, that the rights to that early retirement benefit become nonforfeitable as a result of a partial termination under Code § 411(d)(3) when the plan is fully funded, becomes moot.

Therefore, the remainder of the *Amato* opinion is dicta, notably the sections treating the factual determination whether a partial termination of the plan had taken place under Code § 411(d)(3), and interpreting the obligations of the plan to make distributions in accordance with ERISA § 4044. Thus, these latter portions of the *Amato* opinion cannot be relied upon to support Ashenbaugh's claim of a conflict with the Third Circuit.[9]

---

[9]Ashenbaugh also cites *Shaw* and *Blessitt* for the proposition that these cases illustrate a conflict between the Third Circuit's holding in this case and the law in the Ninth and Eleventh Circuits, respectively. Neither case presents a conflict, in fact both are in harmony with the

(Continued on next page)

Nor is there a conflict among different panels of the Third Circuit concerning the treatment of early retirement benefits for purposes of Code § 411(d)(3). The one case that Petitioners cite as indicating conflict, *Chait v. Bernstein*, 835 F.2d 1017 (3d Cir. 1987), is entirely consistent with that of the present one. *Chait* holds only that Code § 411(d)(6) would prohibit the reduction of an accrued benefit by an amendment, and that a Code § 411(d)(3) termination, even if partial, does not mean that Title IV of ERISA will or should have any application. Naturally, even if there were a conflict among panels of the Third Circuit, this typically would not be a matter for this Court to resolve.

Ashenbaugh also argues that the definition of "accrued benefit" contained in Code § 411(a)(7)(A) has consistently been misapplied by courts when applied to Code § 411(d)(3) and (6). He admits, however, that no court has ever embraced this interpretation of Code § 411(d)(3). (Petition at 9-10). Thus, the Third Circuit decision can not be found in conflict with any other court with respect to

---

(Continued)
holding of the Third Circuit in this case. In both *Shaw* and *Blessitt*, the circuit courts refused to eliminate an integral part of an accrued benefit.

In *Shaw*, the Ninth Circuit held that the *form* of the benefit, specifically the cost of living increase, was an integral part of the normal retirement benefit. Here, the 30 year eligibility requirement is an integral part of the Thirty Year Benefit which the Third Circuit refused to disregard.

The alleged "conflict" with *Blessitt*, is simply the result of Ashenbaugh's misstatement of the Eleventh Circuit's holding. In fact, the holding in *Blessitt* is consistent. As the court stated in *Blessitt*, 848 F.2d at 1171, "well established regulatory interpretation is inconsistent with [the] argument that the law requires a plan to pay unaccrued benefits upon the termination based upon future years of service not actually worked."

this novel theory. Moreover, the Third Circuit clearly understood Ashenbaugh's novel theory, and rejected it by holding that Code § 411(d)(3) did not change the nature, terms or accrual of the Thirty Year Benefit, even if it were assumed to be an accrued benefit under the terms of the Plan. To the extent any portion of the novel theory was not expressly addressed by the Third Circuit, it would seem inappropriate for this Court to review this novel interpretation without adequate review and development of the interpretation in the lower courts.

2. Because the Third Circuit's discussion of ERISA § 4044 was dicta, its decision cannot be in conflict with that of any court.

Section 4044 of ERISA expressly applies only in cases of full or complete termination of employee benefit pension plans. The present case involves only a partial termination for purposes of Code § 411(d)(3) and no other law. Therefore, the present case can add nothing to the controversy surrounding *Amato, Tilley* or *Blessitt.*

Plan § 12.1(b) does refer to ERISA § 4044. The Retirement Committee, in accordance with its obligation to interpret the terms of the Plan, determined that § 12.1(b) did not require the application of ERISA § 4044 under the instant facts because no partial termination for purposes of Title IV of ERISA occurred, as confirmed by the PBGC's inaction, even though a partial termination did occur for purposes of the IRS. *United Steelworkers of America v. Harris & Sons Steel Co.*, 706 F.2d 1289 (3d Cir. 1983).

Furthermore, Ashenbaugh has not challenged the Plan's interpretation of its own terms. The Third Circuit, giving no deference to the decision of the Retirement Committee, concluded:

> The plaintiffs argue that the Plan should have specified, when it incorporated § 4044, that the provision should be read narrowly, and that since the Plan failed to do so § 4044 and Plan § 12.1(b) must be read broadly. We disagree. The reading plaintiffs would give § 4044 is simply wrong, *and § 12.1(b) cannot be considered to incorporate that reading.*

(A. 29, n. 15) (emphasis added).

The holding of the Third Circuit was that the interpretation of § 12.1(b) by the Retirement Committee was correct, regardless of the standard of review.[10] What the Third Circuit said concerning ERISA § 4044 was, therefore, dicta because, by affirming the Plan's interpretation of Section 12.1(b), the Third Circuit was not required to confront the meaning of ERISA § 4044. Consequently, the Third Circuit's comments on the meaning of ERISA § 4044, although correct and consistent with those of the PBGC in its Amicus Brief, is dicta and cannot be in any meaningful conflict with the holding of another circuit. Moreover, the

---

[10]Footnote 1 of the Third Circuit opinion is ambiguous in its reference to a partial plan termination for ERISA purposes. (A. 5). By saying that there was no dispute whether there was a partial termination of the Plan under ERISA, the Court of Appeals must have intended to say that the parties agreed that no partial termination for purposes of Title IV of ERISA occurred. The PBGC determination was known to the parties, the district court, and the Third Circuit, yet the determination was not challenged and the issue was not argued, nor was it raised by the PBGC in its Amicus Brief which assumed ERISA § 4044 to be inapplicable. It is in this sense that there was no dispute. The Plan Retirement Committee held in its decision denying benefits that no partial termination for ERISA purposes took place and that Plan § 12.1(b) was intended to be interpreted narrowly. The Committee rejected the argument that a partial termination for IRS purposes would also trigger a distribution of Plan assets. The Third Circuit expressly sustained the Committee. (A. 29, n.15). Footnote 1 goes on to correctly indicate that a termination for purposes of the IRS is distinguishable from one occurring under ERISA.

question of interpretation of this particular pension plan is not of such general importance to warrant review by this Court.

Perhaps in the hope of demonstrating a conflict, Ashenbaugh has been content only to raise a general objection to the way the Third Circuit discusses ERISA § 4044. But this is not at issue in the present case. Even if this Court were to agree with Ashenbaugh's interpretation of ERISA § 4044, as creating substantive rights, it would have no affect on the holding of the Third Circuit or the District Court that the Retirement Committee was correct in interpreting an application of Plan § 12.1(c) under the facts not to require an automatic reversion or distribution of assets at all under Plan § 12.1(b).

In addition, the Third Circuit discussion regarding the application of ERISA § 4044 as found in other courts of appeals decisions, while shown above to be dicta, is also factually dissimilar from the present matter. The Fourth Circuit's decision in *Tilley* concerned the interpretation of ERISA § 4044 upon the actual termination of a plan and a reversion of the plan's assets. *Tilley,* 815 F.2d at 991. The Eleventh Circuit's decision in *Blessitt,* held that ERISA § 4044 does not require a plan to calculate benefits on the basis of anticipated future years of service upon the actual termination of a plan and the reversion of the plan's assets. *Blessitt,* 848 F.2d at 1179. No complete termination of a pension plan, no allocation of assets and no reversion of surplus assets to the Plan-sponsor occurred in the case *sub jure.*

Accordingly, the Third Circuit's decision is not in conflict with *Amato, Tilley,* or *Blessitt* regarding ERISA § 4044.

II. THE THIRD CIRCUIT DECISION IS SOUND AND IN ACCORDANCE WITH LAW.

A. The Third Circuit Was Correct In Holding That The Thirty Year Benefit, Even If Assumed To Be An Accrued Benefit, Was Not Required By Law Or The Terms Of The Plan To Accrue Ratably Over The Working Life Of The Participants.

Although the Third Circuit assumed, without deciding, that the Thirty Year Benefit was an accrued benefit, it concluded that "a participant does not become entitled to any benefit under the Thirty-Year Retirement provisions until the specified conditions of those provisions are met . . ."[11] (A. 4) Thus, while not critical to this Court's decision on whether a writ should issue in this case, the Plan wishes to make clear that the Third Circuit's alternative holding that the Thirty Year Benefit is not a benefit that accrues over time or on a periodic basis is sound and in accordance with law, such that it is not among the "benefits accrued" under Code § 411(d)(3).

It is Ashenbaugh's position that the Thirty Year Benefit normally does not accrue over time but only upon a Thirty Year Retirement Date. He believes, however, that if a Code § 411(d)(3) partial termination should occur, then the requirement that there occur a Thirty Year Retirement Date implies a 30 year vesting schedule and causes the benefit to retroactively accrue over time by virtue of that Code section. (A. 20, n. 11). Ashenbaugh's interpretation

---

[11]While those Ashenbaugh petitioners without 30 years of Credited Service did not satisfy the precondition for the Thirty Year Benefit—retirement on a Thirty Year Retirement Date—should any of them subsequently again be employed and work for any employer covered by the Plan, they would be entitled to obtain additional years of Credited Service towards benefit eligibility in accordance with Code § 411(a)(4).

misconstrues the Thirty Year Benefit. Nothing in the Code. ERISA or the Plan requires this result. No other law or regulation requires the Thirty Year Benefit to accrue in any manner other than all-at-once upon the participant's fulfillment of all benefit conditions.

The legislative history of ERISA shows that Congress was aware at the time it passed the statute that a number of employers provided "30 and out" pensions as well as other early retirement options, and Congress did not wish to discourage the establishment of these benefits. Congress was also aware that it had to establish periodic accrual requirements for normal retirement benefits in order to prevent "back loading" by employers, which, if allowed, would thwart the vesting rules as to the normal retirement benefit. Congress satisfied both of these goals by establishing three acceptable optional methods under which a normal retirement benefit had to ratably accrue and, at the same time, carefully limiting such accrual rules to normal retirement benefits. The statutory accrual rules, in both ERISA § 204(a) and the Code § 411(b)(1), make no reference to any other benefits, including early retirement benefits, that were not mandated as being required in a plan. Thus, Congress left such unrequired benefits and the time, as well as method of accrual, to be controlled by the plan's terms alone.

House bill, H.R. 2, an early version of ERISA, defined "accrued benefit" in terms of the benefit payable upon the attainment of normal retirement age. H.R. 2, 93d Cong., 2d Session (1974), *reprinted in*, III, *Legislative History of the Employee Retirement Income Security Act of 1974* at 3911. The House Committee Report states:

> Generally, an individual's "accrued benefit" under a defined benefit plan is to be expressed in the form of

> an annual benefit commencing at normal retirement age. Normal retirement age is the age specified in the plan, which may not be later than age 65 (or, if later, the 10th anniversary of the time the participant commenced participation in the plan).

H.R. Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4726.[12]

The House Committee Report then discusses the standards of accrual permitted by ERISA. It is during this discussion that it recognizes the existence of early retirement benefits and their exemption from the accrual standards.

> In order not to impose an undue cost burden on plans which provide for early retirement (for example "30 and out" plans) the committee bill makes clear that the fact that benefits under the plan may be payable to certain employees before normal retirement age may be disregarded [for accrual loading calculations].

Id at 4727. (Brackets added).

The Senate struck out all of the House bill after the enacting clause and substituted its own version. The Committee of Conference agreed to a substitute for both the Senate amendment and the House bill. It is within this context that the following quotation from the Joint Explanatory Statement of the Committee of Conference must be read:

> [T]he accrued benefit does not include the value of the right to receive early retirement benefits, or the value of social security supplements or other benefits under

[12]Section 1.1 of the Plan specifies that the normal retirement age is 65. Therefore, the retirement benefit payable at 65 is the benefit which under the Plan must accrue over time under ERISA.

> the plan which are not continued for any employee after he has attained normal retirement age . . .
>
> In the case of a defined benefit plan, the accrued benefit is to be determined under the plan, subject to certain requirements. In general, the accrued benefit is to be defined in terms of the benefit payable at normal retirement age. Normal retirement age generally is to be the age specified under the plan . . .
>
> Each defined benefit plan is to be required to satisfy one of three accrued benefit tests (which limit the extent of "back-loading" permitted under the plan).

H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Session (1974), *reprinted in,* III, *Legislative History of the Employee Retirement Income Security Act of 1974,* 4518, 4540.[13]

Early retirement benefits are not required to accrue over time in accordance with an established or implied ERISA accrual standard. The nature of an early retirement benefit, including its accrual, may be created and designed in the discretion of the plan-sponsor. *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 513 (1981). As was the Thirty Year Benefit, they may be established as a light-switch benefit in which accrual occurs all-at-once upon the fulfillment of benefit eligibility preconditions and payment establishes vesting rights.

---

[13]This statement definitively answers Ashenbaugh's interpretation of a similar statement in the earlier House Report found in his Petition at page 23 and any alleged confusion as to the legislative history or congressional intent. The Committee of Conference did not intend "or" to mean "such as," and it did not intend early retirement benefits to be protected accrued benefits.

B. The Third Circuit Correctly Held That Section § 411(d)(3) Of The Code Is A Vesting Provision Only And Does Not Alter The Nature Of The Benefit Or Such Benefit's Preconditions Contained In The Plan.

Looking at the definition of the meaning of nonforfeitable makes clear that, Congress knew the difference between rights and benefits becoming nonforfeitable.

> The term "nonforfeitable" when used with respect to a *pension benefit or right* means a claim obtained by a participant . . .

29 U.S.C. § 1002(19); Section 4001(8) of ERISA, 29 U.S.C. § 1301(8).

Thus, as it expressly states and as the Third Circuit correctly noted, Code § 411(d)(3) is a provision that only deals with "rights of all affected employees" becoming nonforfeitable. (A. 19). It does not require that benefits, which have not yet accrued, become nonforfeitable by accelerating their accrual. It does not require that benefit eligibility requirements be eliminated or deemed satisfied. As the Third Circuit stated:

> [Its] purpose is to guarantee to employees who would not otherwise have any vested right to any pension benefits at the time of a plan termination or partial termination that they be treated as having a fully vested right to any benefits that have accrued and are funded.

(A. 19).

Code § 411(d)(3) has never been considered to alter benefits upon plan terminations.[14] In *Nachman Corp. v. PBGC*, 446 U.S. 359, 372-373, *reh'g denied*, 448 U.S. 908 (1980), this Court made it clear that, upon the termination of a plan, it is the *right, not the benefit itself*, that becomes nonforfeitable under ERISA.[15]

It also bears mentioning that, contrary to Ashenbaugh, the IRS has never held that the "retirement-type subsidy" portion of an early retirement benefit is a protected

---

[14]The IRS has never stated that a mere expectation or contingency was an accrued benefit, or that upon termination or partial termination of a plan the requirements necessary to have the expectation come to fruition would be eliminated or the contingency removed. At the time of Ashenbaugh's initial claims and the decisions of the Plan Administrator and the Retirement Committee, the IRS had published two Revenue Rulings that dealt with terminated plan liabilities: Rev. Rul. 83-52, 1983-1 C.B. 87; and Rev. Rul. 85-6, 1985-1 C.B. 133. Revenue Ruling 85-6, which modified and superseded the prior one, is more illustrative of the IRS's position both before and after addition of Code § 411(d)(6) by the Retirement Equity Act of 1984. The ruling demonstrates that Code § 411(d)(6) assumes that benefit preconditions continue to be in effect in order to make it possible for participants to subsequently satisfy the eligibility requirements for early retirement subsidies.

In addition, the PBGC filed an Amicus Curiae Brief in the present case in opposition to the interpretation of Ashenbaugh. The Third Circuit quoted the brief of the PBGC, "[The Plan] nowhere provides that the 'age and service requirements . . . were removed upon the occurrence of [the] Plan termination,' as appellants contend." (A. 20, quoting PBGC Amicus Curiae Brief at 9).

[15]This Court, in *Alessi*, 451 U.S. at 511, addressed the question "what defines the content of the benefit that, once vested, cannot be forfeited?" The Court stated that ERISA is a minimum regulatory statute and it is the private parties, not the statute, that control the level and nature of benefits. *Id.* Neither ERISA nor the Code creates the benefits; they merely establish that, upon termination, one has a nonforfeitable *claim* "to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan." 29 U.S.C. § 1002(19).

accrued benefit under Code § 411(d)(6), when the preconditions for the benefit have not been satisfied. Moreover, in the Congressional deliberation of REA, the Senate Finance Committee specifically addressed the treatment of a 30-year subsidized early retirement benefit as follows:

> [I]f a plan is amended to eliminate a subsidized early retirement benefit for employees who have completed 30 years of service, then the plan would not be required to provide the subsidy to an employee who never completes 30 years of service and it would not be required to provide benefits to such an employee before the normal retirement age.

S. Rep. No. 575, 98th Cong., 2d Sess., at 28, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2547, 2574.

We are aware of no indication in the legislative history of REA that Congress intended a different treatment of a subsidized 30-year early retirement benefit for purposes of § 411(d)(3) than the treatment discussed in the context of § 411(d)(6). The Third Circuit explained that even if the amendments enacted by REA were applicable at the time the instant dispute arose, Ashenbaugh's claims still would be without merit. (A. 27).

Ashenbaugh simply is taking out of context quotations from the IRS Amicus Curiae Brief in *Amato.* In fact, the IRS stated in its Amicus Brief in *Amato:*

> Thus, the effect of the November 16, 1982 Amendment was to deprive plaintiffs of the benefit previously afforded to them under the Plan, to retire prior to age 65 with full benefits (*provided* they met the age and length of service requirements specified in the "Class A" or "Class 75" pension options).

IRS Amicus Curiae Brief at p. 389 (emphasis added).

The IRS here clearly recognizes the continued viability of the terms of the Plan which specify benefit preconditions. The Third Circuit's alternative holding in this case is fully consistent with the IRS's position.

C. The Third Circuit Correctly Found That The Petitioners Were Not Entitled Under The Terms Of The Plan To The Window Benefit Or Benefits Calculated Without Regard To The Provisions Of Plan § 4.3(b).

Ashenbaugh's petition contains claims that have not been made before in this litigation. He now claims a future entitlement to a 5% increase in his benefits under Plan § 5.2 when he would have reached a retirement date but for his termination, and additional benefits when he reaches age 62. These were not among his claims for benefits before the Third Circuit, where he only claimed to have a present right to these benefit add-ons.

The Third Circuit itself first raised the specter of this new issue concerning the future right to these add-ons. (A. 12, n. 7). However, the Circuit stated that the District Court properly did not address the issue, and the Circuit expressly chose not to do so as well. *Id.*

In addition, Ashenbaugh presented no argument in his Petition for these new benefit claims, no argument why the Third Circuit's denial of these benefits at the present time was in error, and no cases in conflict with the holding of the Third Circuit.

Accordingly, because no grounds have even been suggested as to why this Court should grant certiorari on the second question in the Petition, and because the question is of no general interest or importance requiring review, this Court should deny the writ.

CONCLUSION

For the reasons hereinabove set forth and on the authorities herein cited, we respectfully submit that a Writ of Certiorari should not issue to the Court of Appeals for the Third Circuit.

Respectfully submitted,

PETER D. POST
(Counsel of Record)
WILLIAM H. POWDERLY III
DANIEL E. WILLE

REED SMITH SHAW & McCLAY
435 Sixth Avenue
Pittsburgh, PA 15219

Counsel for Respondent,
CRUCIBLE INC 1975 SALARIED
RETIREMENT PLAN

CERTIFICATE OF MEMBERSHIP

It is hereby certified that all of the attorneys whose names appear below are members of the bar of this Court.

.....

PETER D. POST

.....

DANIEL E. WILLE